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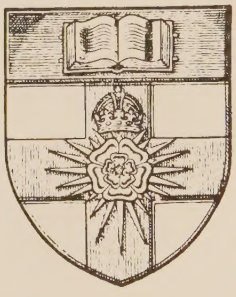

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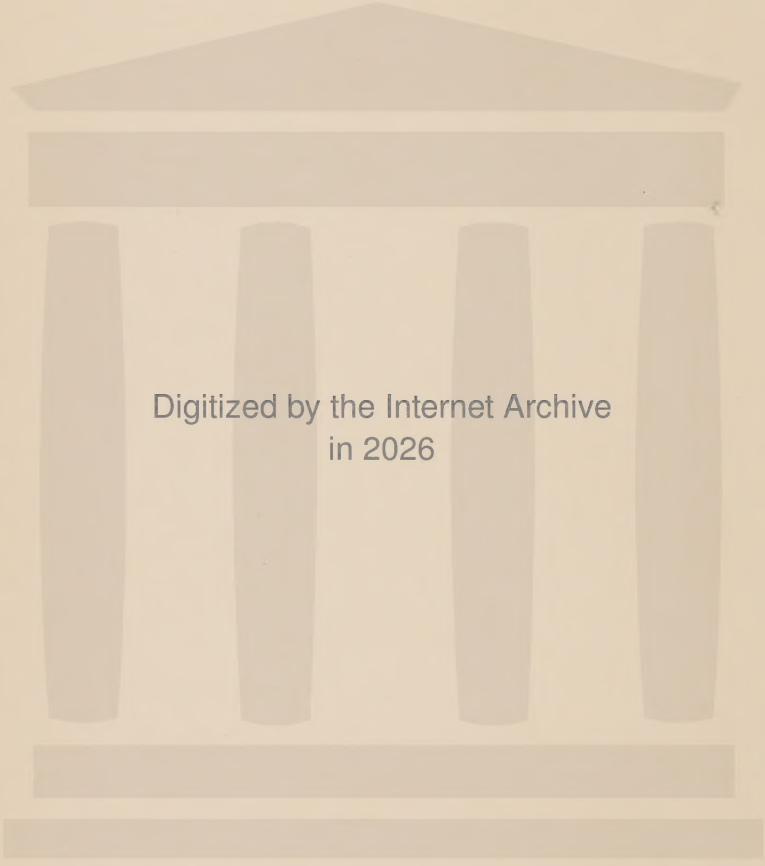
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AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Allan, Crooks *v.*		38
Alliance Bank of Simla *v.* Carey		429
Anderson *v.* Oppenheimer		602
Anglo-American Telegraph Company *v.* Spurling	(C. A.)	188
Simm *v.*	(C. A.)	188
Atwood *v.* Sellar	(C. A.)	286

B.

Babcock *v.* Lawson	(C. A.)	284
Barker *v.* Hemming		609
Bishop, Reg. *v.*	(C. C. R.)	259
Bradshaw, Hawkesley *v.*		22
———, ——— *v.*	(C. A.)	302
British Waggon Company *v.* Lea		149
Budden, Walker *v.*	(C. A.)	267
Burial Board of Bishop Wearmouth, Reg. *v.*	(C. A.)	67
Burnand *v.* Rodocanachi		424
Burns *v.* Nowell	(C. A.)	444
Bury (Lord), Wilson *v.*	(C. A.)	518
Button *v.* The Woolwich Building Society		88

C.

Capper *v.* Wallace		163
Carden, Reg. *v.*		1
Carey, Alliance Bank of, Simla *v.*		429
Castro, Reg. *v.*	(C. A.)	490
Chapman *v.* Great Western Railway Company		278
——— *v.* Midland Railway Company		167
——— *v.* ———	(C. A.)	431
Clementson, Coulthart *v.*		42
Collins *v.* Price		544
——— *v.* Vestry of Paddington	(C. A.)	368
Coulson, Seymour *v.*	(C. A.)	359
Coulthart *v.* Clementson		42
Cramp, Reg. *v*	(C. C. R.)	307
Crooks *v.* Allan		38
Cumpton, Reg. *v.*	(C. C. R.)	341

D.

PAGE

Danby *v.* Hunter 20
Darrell *v.* Tibbitts (C. A.) 560
Davies, Robinson *v.* 26
Debenham *v.* Mellon 394
De Morgan *v.* Metropolitan Board of Works 155
Denham, Mellor *v.* (C. A.) 467
Dickinson, Gill *v.* 159
Du Barry, Stirling *v.* (C. A.) 65
Duckworth, Goldstraw *v.* 275

E.

East and West India Dock Company, Glyn, Mills, Currie, & Co. *v.* 129
Ellis, Williams *v.* 175

F.

Fall, Powell *v.* (C. A.) 597
Farnworth, Spaight *v.* 115
Forwood *v.* North Wales Mutual Insurance Company 57

G.

Gaskarth, Reg. *v.* 321
Gill *v.* Dickinson 159
Gilpin, McCollin *v.* 390
Glyn, Mills, Currie, & Co. *v.* East and West India Dock Company 129
Goldstraw *v.* Duckworth 275
Goodman, Saltash (Mayor of) *v.* 431
Great Western Railway Company, Chapman *v.* 278
Green, Whaley Bridge Printing Company *v.* 109
Greer *v.* Poole 272
Grice, Protector Endowment Loan Company *v.* 121
——, ——— *v.* (C. A.) 592

H.

PAGE

Hamilton *v.* Johnson (C. A.) 263
Hampson, National Mercantile Bank *v.* 177
Harvey, Reed *v.* 184
Hawkesley *v.* Bradshaw 22
——— *v.* ——— (C. A.) 302
Hemming, Barker *v.* 609
Horder *v.* Scott 552
Hull (Corporation of), Nissler *v.* 325
Hunter, Danby *v.* 20
Hutchins, Reg. *v.* 353

I.

Institution of Civil Engineers, Reg. *v.* 48
Irvine *v.* Watson 102
——— *v.* ——— (C. A.) 414

J.

Johnson, Hamilton *v.* (C. A.) 263
Jones *v.* Monte Video Gas Company (C. A.) 556
Juggins, Rainbow *v.* 138
———, ——— *v.* (C. A.) 422

L.

Lawson, Babcock *v.* (C. A.) 284
Lea, British Waggon Company *v.* 149
Letchford *v.* Oldham (C. A.) 538
Liverpool (Corporation of), Prison Commissioners *v.* (C. A.) 332
London and Brighton Railway Company, Reg. *v.* 89
London and South Western Railway Company, Phillips *v.* (C. A.) 78
London Supply Association, Pharmaceutical Society *v.* (C. A.) 310

M.

PAGE

Maclean, Stevenson *v.* 346
McCollin *v.* Gilpin 390
Magrath, Tombs *v.* 548
Maidstone Union, Reg. *v.* 31
Mapleson *v.* Masini 144
Martin, Reg. *v.* (C. C. R.) 34
Masini, Mapleson *v.* 144
May, Reg. *v.* 382
Mellon, Debenham *v.* 394
Mellor *v.* Denham (C. A.) 467
Metropolitan Board of Works, De Morgan *v.* 155
Midland Railway Company, Chapman *v.* 167
———, ——— *v.* (C. A.) 431
Monte Video Gas Company, Jones *v.* (C. A.) 556
Mullins *v.* Treasurer of Surrey 171

N.

National Mercantile Bank *v.* Hampson 177
Newport Coal Company, Yorkshire Waggon Company *v.* 268
New Zealand Land Company *v.* Ruston 474
Nissler *v.* Corporation of Hull 325
North Wales Mutual Insurance Company, Forwood *v.* 57
Nowell, Burns *v.* (C. A.) 444

O.

Oldham, Letchford *v.* (C. A.) 538
Oppenheimer *v.* Anderson 602

P.

Padbury, Reg. *v.* 126
Paddington (Vestry of), Collins *v.* 368
Pearce, Reg. *v.* 386
Pemberton, Reg. *v.* (C. A.) 95

PAGE

Pharmaceutical Society *v.* London Supply Association (C. A.) 310
Phillips *v.* London and South Western Railway Company (C. A.) 78
——— *v.* Phillips (C. A.) 60
Pickles, Wadsworth *v.* 470
Pilley, Ward *v.* (C. A.) 427
Poole, Greer *v.* 272
Powell *v.* Fall (C. A.) 597
Price, Collins *v.* 544
———, Reg. *v.* 300
Prison Commissioners *v.* Corporation of Liverpool (C. A.) 332
Protector Endowment Loan Company *v.* Grice 121
——— *v.* ——— (C. A.) 592

R.

Railway Commissioners, The South Eastern Railway Company *v.* 217
Rainbow *v.* Juggins 138
——— *v.* ——— (C. A.) 422
Redfern, White *v.* 15
Reed *v.* Harvey 184
—— Sir Charles, Reg. *v.* (C. A.) 483
Reg. *v.* Bishop (C. C. R.) 259
—— *v.* Burial Board of Bishop Wearmouth (C. A.) 67
—— *v.* Carden 1
—— *v.* Castro (C. A.) 490
—— *v.* Cramp (C. C. R.) 307
—— *v.* Cumpton (C. C. R.) 341
—— *v.* Gaskarth 321
—— *v.* Hutchins 353
—— *v.* Institution of Civil Engineers 48
—— *v.* London and Brighton Railway Company 89
—— *v.* Maidstone Union 31
—— *v.* Martin (C. C. R.) 34
—— *v.* May 382
—— *v.* Padbury 126
—— *v.* Pearce 386
—— *v.* Pemberton (C. A.) 95

		PAGE
Reg. *v.* Price		300
—— *v.* Sheward		179
—— *v.* Smith	(C. A.)	95
—— *v.* Sir Charles Reed	(C. A.)	483
—— *v.* Truelove		336
—— *v.* Wilson	(C. C. R.)	28
Robinson *v.* Davies		26
Rodocanachi, Burnand *v.*		424
Ruston, New Zealand Land Company *v.*		474

S.

Saltash (Mayor of) *v.* Goodman		431
Saunders *v.* South Eastern Railway Company		456
Scott, Horder *v.*		552
Sellar, Atwood *v.*	(C. A.)	286
Seymour *v.* Coulson	(C. A.)	359
Sheward, Reg. *v.*		179
Simm *v.* Anglo-American Telegraph Company	(C. A.)	188
Smith, Reg. *v.*	(C. A.)	95
South Eastern Railway Company, Saunders *v.*		456
———— *v.* The Railway Commissioners		217
Spaight *v.* Farnworth		115
Spurling, Anglo-American Telegraph Company *v.*	(C. A.)	188
Stern, Williams *v.*	(C. A.)	409
Stevenson *v.* Maclean		346
Stirling *v.* Du Barry	(C. A.)	65
Stooke *v.* Taylor		569
Surrey (Treasurer of), Mullins *v.*		171

T.

Taylor, Stooke *v.*		569
Tibbitts, Darrell *v.*	(C. A.)	560
Tombs *v.* Magrath		548
Truelove, Reg. *v.*		336

W.

Wadsworth *v.* Pickles		470
Wallace, Capper *v.*		163
Walker *v.* Budden	(C. A.)	267
——, Woolhouse *v.*		404
Ward *v.* Pilley	C. A.)	427
Watson, Irvine *v.*		102
——, ——	(C. A.)	414
Wells *v.* Wren		546
Whaley Bridge Printing Company *v.* Green		109
White *v.* Redfern		15
Williams *v.* Ellis		175
———— *v.* Stern	(C. A.)	409
Wilson, Reg. *v.*	(C. C. R.)	28
——— *v.* Lord Bury	(C. A.)	518
Woodhouse *v.* Walker		404
Woolwich Building Society, The, Button *v.*		88
Wren, Wells *v.*		546

Y.

Yorkshire Waggon Company *v.* Newport Coal Company		268

TABLE OF CASES CITED.

A.

		PAGE
Adams *v.* Lindsell	1 B. & A. 681	351
Albert *v.* Grosvenor Investment Company	Law Rep. 3 Q. B. 123	411, 412, 413
Ambrose Lake Tin and Copper Company, Taylor's Case	8 Ch. D. 643	372
Andrews *v.* Paradise	8 Mod. 318	606, 607
Archer *v.* Lavender	Ir. Rep. 9 Eq. 220	532
Armstrong *v.* Stokes	Law Rep. 7 Q. B. 598	105, 106, 415, 417, 419, 420, 421
Ashby *v.* Blackwell	2 Eden, 299; 1 Amb. 503	200
Ashcroft *v.* Foulkes	2 Ex. D. 324	575
Ashurst *v.* Mason	Law Rep. 20 Eq. 225	519
Aspden *v.* Seddon	Law Rep. 10 Ch. 374	160
Attorney General *v.* Moore	3 Ex. D. 276	469

B.

Bacon *v.* Smith	1 Q. B. D. 345	407
Bagnall *v.* Carlton	6 Ch. D. 371	109
Bahia and San Francisco Railway Company, In re	Law Rep. 3 Q. B. 584	192, 193, 195, 197, 198, 204, 205, 206, 213
Barnes *v.* Addy	Law Rep. 9 Ch. 244	531
Bateman *v.* Mid Wales Railway Company	Law Rep. 1 C. P. 499	484
Batut *v.* Hartley	Law Rep. 7 Q. B. 594	136
Baxendale *v.* Great Western Railway Company	5 C. B. (N.S.), at p. 309	219
Beard *v.* Perry	2 B. & S. 493	575
Beattie *v.* Lord Ebury	Law Rep. 7 H. L. 102	394
Bennett *v.* Manchester, Sheffield, and Lincolnshire Railway Company	6 C. B. (N.S.), at p. 707	219, 248
Berdan *v.* Greenwood	3 Ex. D. 257	23, 25, 302, 303, 304, 305, 306
Betts *v.* De Vitre	Law Rep. 3 Ch. 429	519
Birmingham, Churchwardens of *v.* Shaw	10 Q. B. 868; 18 L. J. (M.C.) 89	50
Bishop *v.* Pentland	7 B. & C. 219	543, 545
Blackett *v.* Bradley	31 L. J. (Q.B.) 65	160, 161, 162
Blake *v.* Beech	2 Ex. D. 335	468
Blasco *v.* Fletcher	14 C. B. (N.S.) 147	288
Bodenham *v.* Hoskyns	2 D. M. & G. 903	533
Bolton *v.* Prentice	2 Strange, 1214	396
Boulton *v.* Jones	2 H. & N. 564	152

		PAGE
Bourne *v.* Gatliffe	4 Bing. N. C. 314; 3 M. & G. 643	279, 280
Brice *v.* Bannister	3 Q. B. D. 569	154
Bridges *v.* North London Railway Company	Law Rep. 7 H. L. 213, 235	83
Bristol and North Somerset Railway Company, In re	3 Q. B. D. 10	322
Brown *v.* Great Eastern Railway Company	2 Q. B. D. 406	457, 459
Bryne & Co. *v.* Leon van Tienhoven & Co.	49 L. J. (C.P.) 316	352
Buccleuch (Duke of) *v.* Metropolitan Board of Works	Law Rep. 5 H. L. 418	183
Burgon *v.* Sharpe	2 Camp. 529	164
Burkinshaw *v.* Nicholes	3 App. Cas. 1004	198
Burmester *v.* Norris	6 Ex. 796; 21 L. J. (N.S.) (Ex.) 43	484
Burnett *v.* Lynch	5 B. & C. 589	405, 406

C.

Caldwall *v.* Baylis	2 Mer. 408	405
Calvert *v.* Sebright	15 Beav. 156	607
Campbell *v.* Reg.	1 Cox, 269	496
Caterham Railway Company, In re, *v.* London and Brighton Railway Company	1 C. B. (N.S.) 410; 26 L. J. (C.P.) 161	218, 238, 247, 248, 249, 257
Cefn Cilcen Mining Company, In re	Law Rep. 7 Eq. 88	486
Chamberlain *v.* King	Law Rep. 6 C. P. 474	448
Chambers *v.* Manchester and Milford Railway Company	5 B. & S. 588	484
Chatfield *v.* Sedgwick	4 C. P. D. 459	579, 580, 581, 582, 584, 585, 589, 590
Chilton *v.* Croydon Railway Company	16 M. & W. 212	457
Chinery *v.* Viall	5 H. & N. 288; 29 L. J. (Ex.) 180	197
Chippendale, Ex parte, Re German Mining Company	4 D. M. & G. 19	485
Chorley, Village of, Case of the	1 Salk. 176	343
Clarendon (Earl of) *v.* St. James's, Westminster	10 C. B. 806; 20 L. J. (M.C.) 213	50
Cocks *v.* Masterman	9 B. & C. 902	199, 200
Cole *v.* Firth	4 Ex. D. 301	146, 579, 587, 588
Copenhagen, The	1 C. Rob. 289	288, 297
Corcoran *v.* Gurney	1 E. & B. 456	542
Cooke *v.* Oxley	3 T. R. 653	350, 351, 352
Cooper *v.* Willomatt	14 L. J. (C.P.) 219	285
Cousins *v.* Nantes	3 Taunt. 513	561
Craig *v.* Phillips	3 Ch. D. 722	109
—— *v.* ——	7 Ch. D. 249	372
Crepps *v.* Durden	Cowp. 640	496
Cundy *v.* Lindsay	3 App. Cas. 459	285

D.

Dalby *v.* India and London Life Assurance Company	15 C. B. 365	561
Dearden *v.* Townsend	Law Rep. 1 Q. B. 10	457, 461, 463

		PAGE
De Mattos *v.* Saunders	Law Rep. 7 C. P. 570	542
Dent *v.* Smith	Law Rep. 4 Q. B. 414	272
Dickenson *v.* Jardine	Law Rep. 3 C. P. 639	561
Dunlop *v.* Higgins	1 H. L. C. 381	351
Dunn's Case	1 Lea. C. C. 59	37
Dyer *v.* East	1 Mod. 9, per Kelynge C. T.	395

E.

Ellissen, Ex parte	Folkard on Libel, 4th ed. p. 592	3, 5, 13
Elmslie *v.* Corrie	4 Q. B. D. 295	471, 473
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218	109
Etherington *v.* Parrot	2 Ld. Raymd. 1006	396
Evans *v.* Stevens	4 T. R. 224	388
Everett *v.* Wills	2 Scott's N. C. 531	498
Ex parte Cobb, In re Sedley	Law Rep. 8 Ch. 727	362, 363, 364, 367

F.

Falvey *v.* Stamford	Law Rep. 10 Q. B. 54	83
Fearon *v.* Bowers	1 Sm. L. C. 5th ed. p. 705, n.	134
Ferguson *v.* Wilson	Law Rep. 2 Ch. 77	526, 531
Fish *v.* Kempton	7 C. B. at p. 694	480
Fletcher *v.* Inglis	2 B. & A. 315	543
——— *v.* Rylands	Law Rep. 1 Ex. 265	599
Flower *v.* Local Board of Low Leyton	5 Ch. D. 347	169
Forrest *v.* Davis	Weekly Notes, 1878, p. 88	65
Forsdike *v.* Stone	Law Rep. 3 C. P. 607	83
Fowler *v.* Hollins	Law Rep. 7 H. L. 757	285
——— *v.* Knoop	36 L. J. (N.S.) 219; W. N. 1877; p. 68	269, 270

G.

Gardner *v.* Irvin	4 Ex. D. 49	557
Garside *v.* Trent and Mersey Navigation Company	4 T. R. 581	279, 280
Garth *v.* Cotton	1 W. & T. L. C. 751	405
Gill *v.* Bright	41 L. J. (M.C.) 22	17
Glegg *v.* Gilbey	2 Q. B. D. 209	363
Godsall *v.* Boldero	9 East. 72	561
Golding *v.* Wharton Salt Works Company	1 Q. B. D. 374	302, 304
Green *v.* Cole	2 Wm. Saund. 251	407
Gregg *v.* Coates	23 Beav. 33	405, 408
Gregory *v.* Reg.	15 Q. B. 974	496, 500, 515

H.

Hall *v.* Janson	4 E. & B 500; 24 L. J. (Q.B.) 97	297, 298, 299
Hallett *v.* Wigram	9 C. B. 580, at p. 607	293, 294, 296

		PAGE
Hardwick *v.* Moss	7 H. & N. 136	449
Harrison, Ex parte	16 Jur. 726	383
Harrison's Case	1 Leach C. C. 180	311
Harriss *v.* Fawcett	Law Rep. 15 Eq. 311; 8 Ch. 866	46
Harris *v.* Scaramanga	Law Rep. 7 C. P. 481	273
Hart *v.* Frontino, &c., Gold Mining Company	Law Rep. 5 Ex. 111	192, 195, 197, 204, 205, 213
—— *v.* Dyke	32 L. J. (Q.B.) 55	26, 28
Heald *v.* Kenworthy	10 Ex. 745; 24 L. J. (Ex.) 77	105, 106, 108
—— *v.* ——	10 Ex. 739; 24 L. J. (Ex.) 76	414, 415, 417, 418, 420
Hearne *v.* Edmunds	1 B. & B. 219	543, 544
Heather *v.* Webb	2 C. P. D. 1	471
Hext *v.* Gill	Law Rep. 7 Ch. 699	160
Higgins *v.* Senior	8 M. & W. 834	102
Hillstrom *v.* Gibson	8 Scotch Sess. Cas. (3rd series), 463	164, 166
Hilton *v.* Earl Granville	5 Q. B. 701	160, 161
Hollins *v.* Fowler	Law Rep. 7 H. L. 757	137
Holt *v.* Brien	4 B. & Ald. 252	396
Household Fire Insurance Company *v.* Grant	4 Ex. D. 216	185
Howell *v.* London Dock Company	8 E. & B. 212; 27 L. J. (M.C.) 177	91, 93
Hoyle *v.* Hitchman	4 Q. B. D. 233	555
Hughes *v.* Metropolitan Railway Company	2 App. Cas. 439	412
Hulse, Ex parte. Dagenham (Thames) Dock Company	Law Rep. 8 Ch. 1022, at p. 1025	593
Humble *v.* Hunter	12 Q. B. 310	152
Hyde *v.* Trent Navigation Company	5 T. R. 389	279
—— *v.* Wrench	3 Beav. 334	350

J.

Jakeman *v.* Cook	4 Ex. D. 26	471
Job *v.* Langton	6 E. & B. 779	298
Johnson *v.* Stear	15 C. B. (N.S.) 330; 33 L.J. (C.P.) 130	197
Johnston *v.* Sumner	3 H. & N. 261	396
Jolly *v.* Rees	15 C. B. (N.S.) 628	395, 401, 404
Jones *v.* Festiniog Railway Company	Law Rep. 3 Q. B. 733	600
Julia Fisher, The	2 P. D. 115	146

K.

Kelly *v.* Sherlock	Law Rep. 1 Q. B. 686	83
King, Ex parte. Palethorpe, In re	Law Rep. 20 Eq. 273	143
Kingsford *v.* Marshall	8 Bing. 458	542, 543, 544, 547
Kingston, Duchess of, Case	2 Sm. L. C. 5th edit. 656	355
Knatchbull *v.* Hallett	13 Ch. D. 696	481, 482
Knights *v.* Wiffen	Law Rep. 5 Q. B. 660	200, 204, 212, 216
Kymer *v.* Suwercropp	1 Camp. 109	108

L.

		PAGE
Land Credit Company of Ireland *v.* Fermoy	Law Rep. 8 Eq. 7	519
Lascelles *v.* Butt	2 Ch. D. 588	428, 430
Leather *v.* Simpson	Law Rep. 11 Eq. 398	199
Lee *v.* Sankey	15 Eq. 204, at p. 213	533
Leigh, In re	3 Ch. D. 292	428
——— *v.* Taylor	7 B. & C. 491	485
Lickbarrow *v.* Mason	1 Sm. L. C. 5th ed. p. 601	134
Lloyd *v.* Guibert	Law Rep. 1 Q. B. 115	272
London, Brighton, and South Coast Railway Company *v.* Watson	3 C. P. D. 429	457, 462
Longman *v.* East	3 C. P. D. 142	430
Lumley *v.* Gye	23 L. J. (Q.B.) 112	27

M.

McAndrew *v.* Barker	7 Ch. D. 701	370, 372
Mac Kay's Case	2 Ch. D. 1	109
Macgregor *v.* Shaw	2 De G. & Sm. 360	145
Magnus *v.* Bultemer	11 C. B. 876	543, 544
Manby *v.* Scott	2 Smith's L. C. 445	395
Marsh *v.* Wells	2 S. & S. 87	405
Mason *v.* Sainsbury	3 Doug. 61	561
Mavro *v.* Ocean Marine Insurance Company	Law Rep. 9 C. P. 595	288
Messenger *v.* Andrews	4 Russ. 478	405, 408
Meyerstein *v.* Barber	Law Rep. 2 C. P. 39	132, 135
——— *v.* ———	Law Rep. 4 H. L. 317	133, 134
Mitchell *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 Q. B. 256	279
Montague *v.* Benedict	2 Smith's L. C. 483	396
Mortimer *v.* South Wales Railway Company	28 L. J. (Q. B.) 129; 1 E. & E. 375	179
Myers *v.* Defries	5 Ex. D. 15	577
Myler *v.* Fitzpatrick	6 Madd. 360	534

N.

Neale *v.* Clarke	4 Ex. D. 286	146, 588
Nelson *v.* Dahl	12 Ch. D. 568	163
Newman *v.* Cazelet	Park. Ins. 900, 8th Ed.	288
North British and Mercantile Insurance Company *v.* London, Liverpool, and Globe Insurance Company	5 Ch. D. 569	561, 563, 565, 566

O.

O'Brien *v.* Clement	15 M. & W. 435	23, 302
O'Connell *v.* Reg.	11 C. & F. 155	495, 517
Offord *v.* Davies	12 C. B. (N.S.) 748; 31 L. J. (N.S.) (C. P.) 319	46
Oxlade, In re *v.* North Eastern Railway Company	1 C. B. (N.S.) 454; 26 L. J. (C.P.) 129	218

P.

		PAGE
Patent File Company, In re. Ex parte Birmingham Banking Company	Law Rep. 6 Ch. 83	486
Peachy *v.* Duke of Somerset	2 W. & T. L. C. 100	523, 595
——— *v.* Somerset	W. & T. L. C. 3rd ed. vol. ii. p. 979	122
Phosphate Sewage Company *v.* Hartmont	5 Ch. D. 394	109
Pickard *v.* Sears	6 A. & E. 469	204
Pickering *v.* Stephenson	Law Rep. 14 Eq. 322	519
Plummer *v.* Wildman	3 M. & S. 482	291, 292, 393, 297
Polak *v.* Everett	1 Q. B. D. 669	142
Potter *v.* Chambers	4 C. P. D. 457	589
Powell *v.* Gudgeon	5 M. & S. 431	273
——— *v.* Rees	7 A. & E. 425	405
Power *v.* Whitmore	4 M. & S. 141	292–94, 296, 297
Preston *v.* Dania	Law Rep. 8. Ex. 19	122
Price *v.* Neal	1 Wm. Black 390	201
Pridgeon's Case	Cro. Car. 341, 350	383
Pringle *v.* Gloag	10 Ch. D. 676	611
Purchas and the Cambridge Philosophical Society *v.* Parish of Holy Sepulchre	4 E. & B. 156	50
Purvis *v.* Traill	3 Ex. 344; 18 L. J. (M.C.) 57	50

R.

Raynard *v.* Chase	1 Burr. 2	312
Read *v.* Legard	6 Ex. 636	396
Rees *v.* Engelback	Law Rep. 12 Eq. 225	405
Reid *v.* Teakle	13 C. B. 627	397
Reg. *v.* All Saints, Churchwardens of	1 App. Cas. 619	69
—— *v.* Brandt	20 L. J. (M.C.) 119	51
—— *v.* Bridgman	15 L. J. (M.C.) 44	384
—— *v.* Cockburn	16 Q. B. 480	50
—— *v.* Cutbush	Law Rep. 2 Q. B. 379	500, 516, 518
—— *v.* Fletcher	2 Q. B. D. 43	468
—— *v.* Glynne	Law Rep. 7 Q. B. 16	383, 384, 385
—— *v.* Great Western Railway Company	E. B. & E. 600, at p. 613 n.; 28 L. J. (M.C.) 59, at p. 64	91, 93
—— *v.* Haughton	1 E. & B. 501	356
—— *v.* Hennah	13 Cox, C. C. 547	308, 309, 310
—— *v.* Isaacs	32 L. J. (M.C.) 52; L. & C. 220	303, 309
—— *v.* Jones	8 Q. B. 719; 15 L. J. (M.C.) 129	51
—— *v.* Leeds	4 Q. B. D. 323	32, 33
—— *v.* Lonsdale	4 F. & F. 56	496
—— *v.* Manchester and Leeds Railway Company	8 A. & E. 413	179
—— *v.* Manchester, Overseers of	16 Q. B. 449; 20 L. J. (M.C.) 113	50
—— *v.* Perry	2 Cox C. C. 223	309
—— *v.* Robinson	6 P. & L. 295	384
—— *v.* Royal Medical Society	30 L. T. (O.S.) 133; 21 J. P. 789	51
—— *v.* Saddlers' Company	3 E. & E. 42, 84	322
—— *v.* St. John's, Westgate, Burial Board of	2 B. & S. 703	70, 71, 73
—— *v.* Mary's, Islington	Law Rep. 5 Q. B. 445	32

		PAGE
Reg. *v.* South Holland Drainage Committee	8 A. & E. 429	179, 182
—— *v.* Steel	2 Q. B. D. 37.	468
—— *v.* Sudbury Burial Board	E. B. & E. 264	69
—— *v.* Townsend	4 F. & F. 1089; 10 Cox C. C. 356	3, 5, 13
—— *v.* Zoological Society of London	23 L. J. (M.C.) 139	50
Rex *v.* Benfield	2 Burr. 980	497
—— *v.* Chapelwardens of Bradford	12 East. 556	486
—— *v.* Galloway	1 Mood. C. C. 234	499
—— *v.* Hants	1 B. & Ad. 654	338
—— *v.* Heywood	L. & C. 451	500
—— *v.* Jenkin	Cas. K. B. t. Hardw. 301	383, 384
—— *v.* J. J. Leicestershire	15 Q. B. 89	338
—— *v.* Johnson	3 M. & S. 539	496
—— *v.* Jones	2 Camp. 131	496
—— *v.* Justices of Flintshire	5 B. & A. 761	486
—— *v.* Pease	4 B. & Ad. 30	599, 601
—— *v.* Powell	2 B. & Ad. 75	495
—— *v.* Price	6 East. 323	497
—— *v.* Robinson	1 Mood. C. C. 413	496, 499, 501, 515, 517
—— *v.* Tenant	2 Ld. Raym. 1423	383
—— *v.* Wilkes	4 Burr, 2527	499, 501, 502, 509, 514, 515
—— *v.* Williams	1 Lea C. C. 529	500, 514, 515
Rhodes *v.* Forwood	1 App. Cas. 256	519
——— *v.* Liverpool Commercial Investment Company	4 C. P. D. 425	362
Richardson *v.* Williamson	Law Rep. 6 Q. B. 276	393
Robbins *v.* Fennell	11 Q. B. 248	480
Roberts *v.* Orchard	2 H. & C. 769; 33 L. J. (Ex.) 65	448
Robinson *v.* Reynolds	2 Q. B. 196	199
Rabone *v.* Williams	7 T. R. 360, n	479
Robson *v.* Drummond	2 B. & Ald. 303	152, 153
Rodoconachi *v.* Elliott	Law Rep. 2 C. P. 518	272
Routledge *v.* Grant	4 Bing. 653	351
Rowbotham *v.* Wilson	8 H. L. C. 348	161
Rowley *v.* London and North Western Railway Company	Law Rep. 8 Ex. 231	79, 83, 84
Ruddock *v.* Marsh	4 H. & N. 601	395, 399
Runtz *v.* Sheffield	4 Ex. D. 150	65
Russell Institution *v.* St. Giles and St. George, Bloomsbury	3 E. & B. 416	50
Ryalls *v.* Reg.	11 Q. B. 781	495
Ryan *v.* Sams	12 Q. B 460	396
Rylands *v.* Fletcher	Law Rep. 3 H. L. 330	599, 600 602, 607, 608, 609

S.

Sarquy *v.* Hobson	4 Bing. 131	273
Schmidt *v.* Royal Mail Steamship Company	45 L. J. (Q.B.) 646	39
Selmes *v.* Judge	Law Rep. 6 Q. B. 724	449
Shand *v.* Sanderson	4 H. & N. 381	164
Shaw *v.* Stenton	2 H. & N. 858	606, 607
Shield *v.* Wilkins	5 Ex. 304; 19 L. J. (Ex.) 238	163

		PAGE
Simonds *v.* White	2 B. & C. 805	288
Simpson *v.* Thompson	3 App. Cas. 279	561
Sims *v.* Bond	5 B. & Ald. 389	479
Skingley, Re	3 Mac. & G. 221	405
Slater's Case	Cro. Car. 470	383
Sloman *v.* Walters	W. & T. L. C. 3rd ed. vol. ii. p. 991	122
——— *v.* Walter	2 W. & T. L. C. 1112	593, 595
Small *v.* Nairne	13 Q. B. 840	27
Smith *v.* Hopper	9 Q. B. 1005; 16 L. J. (Q.B.) 93	449
Smyth *v.* Anderson	7 C. B. 21; 18 L. J. (C.P.) 109	102, 420
Spurr *v.* Hall	2 Q. B. D. 615	23, 302
St. Leonard's, Guardians of, Shoreditch *v.* Franklin	3 C. P. D. 377	311
Standard Discount Company *v.* La Grange	3 C. P. D. 67	370
Staples *v.* Young	2 Ex. D. 324	578, 588
Steinkeller *v.* Newton	2 Moo. & R. 372	27
Sterne *v.* Beck	1 De Gex J. & S. 595; 32 L. J. (Ch.) 682	122, 593, 596
Stewart *v.* Austin	Law Rep. 3 Eq. 299	519
——— *v.* West India and Pacific Steamship Company	Law Rep. 8 Q. B. 88	299
Sturt *v.* Mellish	2 Atk. 612	531

T.

Tawney's Case	2 Salk. 531	485
Taylor *v.* Merchants' Fire Insurance Company	9 How. Sup. Court Rep. 390	352
——— *v.* Goodwin	4 Q. B. D. 228	176
Thompson *v.* Hudson	Law Rep. 4 H. L. 1	122, 124, 125, 593, 596
——— *v.* Thompson	27 L. J. (P.M. & A.) 65	33
Thomson *v.* Davenport	9 B. & C. 78	105, 106, 415, 417, 418, 419, 421
The People ex rel. Tweed *v.* Liscomb	15 Sickel's N. Y. C. A. 559	499, 503, 504, 516, 517
Tigress, The	33 L. J. (P.M. & A.) 97	134
Tod *v.* Stokes	12 Mod. 244	396
Treleaven *v.* Bray	45 L. J. (Ch.) 113	269
Trowell *v.* Shenton	8 Ch. D. 318	370

V.

Vaughan *v.* Taff Vale Railway Company	5 H. & N. 679	599, 600, 601

W.

Waddington *v.* Guardians of the Poor of the City of London Union	E. B. & E. 370; 28 L. J. (M.C.) 113	485
Waithman *v.* Wakefield	1 Camp. 120, at p. 121	396
Walker *v.* Balfour	25 W. R. 511	269
——— *v.* Richardson	2 M. & W. 882	312
Waller *v.* Hanger	2 Bulstr. 134, 261	339
Walsall, Overseers of *v.* London and North Western Railway Company	4 App. Cas. 30	97

		PAGE
Walthew *v.* Mavrojani	Law Rep. 5 Ex. 116	298, 299
Waterlow *v.* Sharp and Gardiner *v.* Sharp	Law Rep. 8 Eq. 501	486
Watson *v.* Rodwell	3 Ch. D. 380	302, 304
Webb, In re	8 Taunt. 443	279, 284
Wells *v.* Hopwood	3 B. & Ad. 20	542, 543, 545
Welsh Steam Coal Collieries *v.* Gaskell	36 L. T. (N.S.) 352	557
West Jewell Tin Mining Company, Little's Case, In re	8 Ch. D. 806	372, 374
West *v.* London and North Western Railway Company	Law Rep. 5 C. P. 622	218
Wildman *v.* Lade	4 De G. & J. 401	376
Wilkes *v.* Rex	Wil. Opin. 334	515
Williams *v.* Everett	14 East. 582	480
Wilson *v.* Anderton	1 B. & Ad. 450	135
——— *v.* Bank of Victoria	Law Rep. 2 Q. B. 203	288
Wincham Shipbuilding, Boiler and Salt Company, In re. Hallmark's Case	9 Ch. D. 329	519
Winterfield *v.* Bradnum	3 Q. B. D. 324, 326	145, 147, 577, 581, 587
Woodley *v.* Coventry	2 H. & C. 164; 32 L. J. (Ex.) 185	197
Wulff *v.* Jay	Law Rep. 7 Q. B. 756	142

Y.

Yarborough *v.* Bank of England	16 East. 6	312
Yates *v.* Whyte	4 Bing. (N.C.) 272	561
York and North Midland Railway Company *v.* The Queen	1 E. & B. 858	254, 256

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

AND BY THE

COURT FOR CROWN CASES RESERVED

XLIII VICTORIA.

THE QUEEN *v.* SIR ROBERT CARDEN.

1879
Nov. 21.

Criminal Law—Justices, Jurisdiction of, upon preliminary Inquiry into criminal Charge—Evidence—Libel, Truth of, not a Subject of Inquiry before Magistrate—6 & 7 *Vict. c.* 96, *ss.* 4, 5, 6.

Upon an information for maliciously publishing a defamatory libel under the 5th section of 6 & 7 Vict. c. 96, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, and a defence based upon the truth of the libel under section 6 of the Act can only be inquired into at the trial upon a special plea framed in accordance with the terms of that section.

The province of a magistrate upon a preliminary inquiry into a charge of an indictable offence discussed.

THIS was an application for a mandamus directed to Sir Robert Carden, an alderman and magistrate of the City of London, commanding him to hear certain evidence upon an information for libel laid before him by Edward Levy Lawson against Henry Labouchere and Charles Wyman. The information did not charge the libel to have been published by the defendants knowing it to be false under the 4th section of 6 & 7 Vict. c. 96, but merely charged the publication of a defamatory libel under

529

1879

THE QUEEN v. CARDEN.

the 5th section. The application was made on behalf of the defendants, and the writ of mandamus asked for was in substance to the following effect, viz., to hear evidence in cross-examination by the defendants of the complainant and the complainant's witnesses, and direct evidence of the defendants and their witnesses to prove, first, that the alleged libel was not a false and defamatory libel: secondly, that it was a fair comment on a public man in a matter which was a question of public interest; thirdly, that the alleged libel was true in substance and in fact; fourthly, that it was for the public benefit that the alleged libel should be published; and fifthly, that it was not published knowing it to be false, and further, to hear all evidence relating to the libel and to the circumstances under which the same was published, and to the conduct of the complainant in relation thereto, with a view to the exercise of the discretion of the said alderman as to whether he should or should not commit the defendants for trial. And further, to hear all evidence on cross-examination of the complainant and his witnesses going to their credit, and to bind over the witnesses to appear at the trial.

It appeared from the affidavits that, in the course of the hearing of the charge before the magistrate, a claim was made on the part of the defendants to cross-examine the complainant and the complainant's witnesses, and to call witnesses, in respect of certain matters tending to prove the truth of the defamatory statements contained in the libel. The libel appeared to have related to the conduct of the prosecutor in his management of the *Daily Telegraph* newspaper, and among other things called him "a disgrace to journalism." The questions, which it was sought to put in cross-examination, and the evidence which it was sought to call on behalf of the defendants, appeared to relate to the conduct by the prosecutor of the *Daily Telegraph*.

The magistrate refused to admit the evidence, and postponed the further hearing to admit of the correctness of his ruling being questioned by application for a mandamus. A rule nisi had consequently been obtained for a mandamus as above, against which

Sir John Holker, A.G., Sir H. S. Giffard, S.G., Ballantine, Serjt., and *Poland*, for the prosecutor, shewed cause. Evidence

to prove the truth of the libel was clearly inadmissible before the magistrate. Previously to Lord Campbell's Act, 6 & 7 Vict. c. 96, the truth of a libel afforded no defence to a criminal charge of libel. By that statute a defence based upon the truth of the libel may be pleaded specially to the indictment, and so rendered available at the trial, but the magistrate has no jurisdiction to go into the question whether the libel was true, and must commit even although it should be proved to be true: *Reg.* v. *Townsend.* (1) The case of *Ex parte Ellissen* (2) did not overrule *Reg.* v. *Townsend.* (1) There the charge was under the 4th section of Lord Campbell's Act, of publishing a libel knowing it to be false, and the magistrate, having refused to hear evidence as to the truth of the libel, was held by the Court to have declined to hear and determine the matter which he was bound to hear and determine, and accordingly a mandamus issued. This is altogether a different case. The information is for a simple libel under s. 5 of Lord Campbell's Act. The present application is that the magistrate, in the course of an inquiry on a matter within his jurisdiction, may be ordered to hear certain evidence entirely irrelevant to the question which he has to investigate. There is no statutory provision rendering it the duty of the magistrate to receive and record any evidence which may possibly be serviceable to the defendant at the trial for any purpose such as the mitigation of punishment. By Jervis's Act, 11 & 12 Vict. c. 42, s. 17, the magistrate is to take down only what is material to the charge, and the terms of the Act clearly shew that his duty is merely to inquire whether there is a sufficient case for a committal or not. Russell Gurney's Act, 30 & 31 Vict. c. 35, s. 3, was intended to remedy the hardship caused to poor persons who could not call their witnesses at the trial, and its provisions are confined to witnesses that are material to disprove the charge. It was not intended to extend the scope of the inquiry before the magistrate to all matters that might be serviceable to the prisoner.

It would be most inconvenient that all matters which might tend to throw obloquy on the prosecutor might be gone into before the magistrate though not amounting to a legal defence.

(1) 4 F. & F. 1089; 10 Cox C. C. 356.
(2) Not reported, but referred to in Folkard on Libel and Slander, 4th ed. p. 592.

1879

THE QUEEN v. CARDEN.

Gorst, Q.C., and *Lumley Smith*, appeared for the magistrate, Sir Robert Carden.

Russell, Q.C., *Wildey Wright*, and *McDonell*, supported the rule. The various statutes relating to the procedure before magistrates from 2 & 3 Ph. & M. c. 13 down to Jervis's Act, 11 & 12 Vict. c. 42, have made it the duty of the magistrate to inquire into all the facts and circumstances of the case. The magistrate here held that his duty was simply to inquire whether there was a primâ facie libel and a publication by the defendants. It does not follow that because the magistrate has not jurisdiction to decide on certain questions that may arise on the facts and circumstances taken as a whole, that, therefore, he is not to receive the evidence as to the facts and circumstances. It is contended, for instance, that the defendant is entitled to cross-examine before the magistrate as to circumstances that would go in mitigation of punishment, and to have the result of such cross-examination recorded by the magistrate. The witnesses might die or be ill, and their depositions would then be read at the trial, and the defendant would lose the benefit of mitigating circumstances connected with the offence that might have been elicited from them, while their testimony, so far as it bore against him, would be perpetuated. The magistrate's function is to make a preliminary inquiry into anything that may be material to the case, whether with regard to the guilt or innocence of the accused or the character of the offence. It is contended that, inasmuch as the truth of the libel, if its publication was for the public benefit, may be a defence at the trial, the magistrate ought to receive evidence as to that. Russell Gurney's Act, 30 & 31 Vict. c. 35 s. 3 clearly contemplates that an accused person should have the benefit of calling any witnesses that may be material to his case before the magistrate, and of having them bound over to appear. The fact that the truth of the libel cannot be pleaded until the trial is no answer to the argument derived from the provisions of the statute. Whether the evidence is such as the magistrate can decide upon or not, the intention is that the accused should be able to have any witnesses that may at the trial be essential to his defence called and bound over to appear. The evidence refused was admissible on the question of libel or no libel, inasmuch as it tended to shew that

the libel was a fair comment on the conduct of a public man. The case is exactly within the authority of *Ex parte Ellissen* (1) in which this Court granted a mandamus to the magistrate. That case must be taken to have overruled *Reg. v. Townsend.* (2) Although the defendant is not charged before the magistrate with publishing the libel knowing it to be false, this makes no substantial difference between this case and *Ex parte Ellissen* (1), for a count may be added to the indictment, charging that he did so, before the trial.

COCKBURN, C.J. This is a case of some importance, but it is, in my opinion, so clear that we need not hesitate to give judgment at once discharging the rule. The application is of a somewhat startling nature. In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, we have undeniably jurisdiction in the exercise of our mandatory authority to direct him to hear and determine. In the present case we are applied to, while the case is under consideration, to interfere and direct the magistrate as to the course he shall pursue. While we have authority to issue a mandamus to hear and determine, we have no authority, as it seems to me, to control the magistrate in the conduct of the case, or to prescribe to him the evidence which he shall receive or reject, as the case may be. We are not called upon here to exercise anything in the nature of appellate jurisdiction. That could only be done when the case was at an end, in such cases as may come within our appellate jurisdiction. We are called upon to issue a mandamus commanding the magistrate to take a certain course while the case is pending. This is, in my opinion, an application of a very anomalous character. In the case of *Ex parte Ellissen* (1), which has been referred to, it seems to me that this Court went to the utmost limits of its mandatory jurisdiction, and I should be extremely unwilling to extend the doctrine of that case to any other set of circumstances.

It is said that in this case the magistrate has declined jurisdiction.

(1) Not reported, but referred to in Folkard on Libel and Slander, 4th ed. p. 592.

(2) 4 F. & F. 1089; 10 Cox C. C. 356.

1879

THE QUEEN v. CARDEN.

Cockburn, C.J.

That involves the question whether he had jurisdiction to hear this evidence. I am clearly of opinion that he had not. The duty and province of the magistrate before whom a person is brought, with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if there be any, whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case. That being so, in my opinion, unless there is some further statutory duty imposed on the magistrate, the evidence before him must be confined to the question whether the case is such as ought to be sent for trial, and if he exceeds the limits of that inquiry, he transcends the bounds of his jurisdiction. This case was one of a charge of libel, and the magistrate had to inquire, first, whether the matter complained of was libellous, and, secondly, whether the publication of it was brought home to the accused, so far as that there ought to be a committal. It is argued that he ought to do more, and to receive evidence to shew the truth of the matter complained of as libellous. I meet that proposition with an unhesitating negative. By the common law, independently of statute as settled prior to Lord Campbell's Act (6 & 7 Vict. c. 96), whatever may have been the state of things in more ancient times, the truth of the matter complained of constituted no defence to a criminal charge of libel. It can only become a defence under the statute, and then only when the statutory conditions are complied with. Therefore, independently of statute, the magistrate could not receive evidence of the truth of the libel. The question then arises whether Lord Campbell's Act enables him to do so. In my opinion it does not, because by the provisions of the Act the defence founded upon the truth of the libel does not arise at that stage, and cannot be put forward before the magistrate. The test of this is the question which I asked during the argument, but to which I received no satisfactory answer. Suppose the defendant had succeeded fully and entirely in shewing the truth of the libel. What then would have been the duty of the magistrate? He would nevertheless have been bound to send the case for trial, because by the statute the truth of the libel does not constitute a defence until the statutory conditions are complied with, and they cannot be

complied with at that stage of the inquiry. There must first be commitment or holding to bail, then indictment, and then a plea such as may satisfy the exigency of the statutory conditions. Until then the truth of the libel cannot be set up as a defence. How then could it be the duty of the magistrate to enter upon an inquiry into the truth of the libel, seeing that if the truth of it had been established he was still bound to commit? It seems to me abundantly clear that any such inquiry was beyond the province of the magistrate, as being irrelevant to the matter he had to determine, viz., whether the case as laid before him was sufficient to call upon him to commit or hold the accused to bail. If such a case is made out before him, then a defence, that cannot be raised until after the indictment has been found and a plea pleaded in accordance with the conditions imposed by the statute, is entirely beyond his province and jurisdiction.

Then it was argued that although the truth of the matter complained of could not be made use of as a defence at that stage of the proceedings, so as to justify the magistrate in declining to commit, still the evidence should have been received with a view to its being available for a collateral purpose, viz., the perpetuation of testimony. But, when I look to the statutes that have been referred to, I find no mention of perpetuation of testimony. The perpetuation of testimony is no doubt one of various very great incidental advantages arising from the provisions of the statutes relating to the duties of justices in these matters. In the first place those who have to frame the indictment have the advantage of seeing the whole of the evidence on the depositions, and of being able to adapt the indictment to it. The judge also is enabled to make himself acquainted with the facts before the trial. Again, if there is any discrepancy between the deposition of a witness and his statement at the trial, this may afford substantial grounds for shaking his evidence. Lastly, if a witness dies, or is too ill to attend, his testimony is perpetuated. But, although these are advantages incidental to the mode of taking evidence before magistrates prescribed by the statutes, I find nothing in these statutes to warrant the conclusion that because of these advantages the magistrate may exceed the limits of his proper jurisdiction, and enter into an inquiry

1879

THE QUEEN v. CARDEN.

Cockburn, C.J.

altogether foreign to the question upon which he has to determine.

Then it is said that this evidence was receivable to shew that the matter complained of was a fair comment on the conduct of a public man. The fallacy of this argument is so transparent as to render it hardly worth discussion. It is true that a comment upon given facts, which would otherwise be libellous, may assume a privileged character, because, though unjust and injurious, yet being founded on facts not in themselves libellous, it is a comment which any one is entitled to make upon a public man. For instance, suppose that any one states facts not in themselves libellous of a candidate for election to parliament, and on them bases the conclusion that he is not an honest politician. The comment may be injurious, but it may be privileged as a fair comment on the facts, if not malicious, because made on a public man.

On the other hand, to say that you may first libel a man, and then comment upon him, is obviously absurd. If you say that a man has committed such and such a crime, and therefore he is so and so, you cannot, because he is a public man, justify not only your comment, but also the facts which you state. In the present case facts were stated independently of the comment. The libel says Mr. Lawson is so and so, and therefore he is a disgrace to journalism. If you state a number of libellous facts, you cannot justify them on the ground that they are comments on a public man. You may comment on facts, and your comment, if made on a public man, may possibly escape the penalty of libel, though injurious, because it is privileged; but the statement of facts must not be libellous, or you must be prepared to prove the truth of it. Here the facts are clearly libellous, unless the truth of them could be proved, and that could not be done until a later stage. In every point of view, therefore, we come to the conclusion that the evidence was not receivable before the magistrate. There is only one ground on which anything like an urgent case for the reception of such evidence can be rested, as it was rested by the learned counsel who appeared for the applicants, viz., the possibility that one or more of the witnesses might die or fall ill before the trial. The prosecutor, for instance, might die, and so the defendant be

deprived of the benefit of his cross-examination. After the indictment is preferred the whole of this evidence, if admissible, may be received at the trial; but the danger upon which so much reliance has been placed does not seem to us to afford a sufficient reason for extending the provisions of the statutes beyond their natural limits.

It was argued by Mr. Russell that it was intended by Russell Gurney's Act to enable an accused person to obtain evidence and to perpetuate evidence by calling witnesses before the magistrate, with the view of establishing anything which at any time throughout the whole course of the inquiry, not only before the magistrate, but afterwards at the trial, could possibly have any relevancy in his favour. But, as I have already said, the object of the statute does not seem to me to be the perpetuation of testimony, and I do not think the magistrate has power to receive evidence for a collateral purpose wholly foreign to his jurisdiction. The test of the admissibility of evidence before the magistrate, in my opinion, is its relevancy to the inquiry into the offence with which the accused is charged, viz., whether there is a case upon which he ought to be committed for trial or held to bail. For these reasons I am of opinion that the rule must be discharged.

LUSH, J. There are two questions involved in this case which I wish to keep distinct. The first is one of general importance, as affecting the practice of magistrates in hearing charges of every description. The second is of a more limited character, as affecting only cases such as the present. The first contention is that an accused person has a right to require the magistrate to receive any evidence which might be serviceable to him if put upon his trial, though it may have no tendency to prove or disprove the charge. That is in effect the general proposition for which Mr. Russell contended. For example, if the evidence only went to mitigation of punishment, yet it is contended that the magistrate must receive it though it does not affect the question before him. This is the first time that I ever heard such a doctrine put forward, and so far as I know there is no authority not even of a dictum in its favour. I do not find anything in the statutes to support it. The argument was based upon particular phrases

1879

THE QUEEN v. CARDEN.

Lush, J.

found in the Acts 2 & 3 Ph. & M., c. 13, and 7 Geo. 4, c. 64, and Jervis's Act, and an endeavour was made to support it by urging upon us considerations of convenience and inconvenience. Those considerations can have no weight at all if they are inconsistent with the language of the Acts. And I cannot help saying in passing that it seems to me that they are met by equal considerations of the same sort pointing in the opposite direction. The 2nd section of 2 & 3 Ph. & M. c. 10, says that the justices shall "take the examination of such prisoner and information of those that bring him of the fact and circumstance thereof, and the same or as much thereof as may be material to prove the felony shall put in writing within two days after the said examination." The only thing that was by that Act to be put in writing was that which was material to prove the felony. The 7 Geo. 4, c. 64, s. 2, was in almost the same language. By that Act what the magistrates were to take down in writing was the information on oath "of those who shall know the facts and circumstances of the case or so much thereof as may be material," and it does not seem to contemplate evidence for the defence. Then, again, in Jervis's Act, 11 & 12 Vict. c. 42, s. 17, it is provided that the magistrate shall "take the statement on oath or affirmation of those who shall know of the facts and circumstances of the case," and shall put the same into writing. Up to this period, then, it is clear that all that was to be put into writing was the evidence that was material to the charge against the accused, and so matters long continued. Then came Russell Gurney's Act 30 & 31 Vict. c. 35. By the 3rd section of that Act provision is for the first time made for taking the evidence of the prisoner's witnesses. It is argued that the object was to perpetuate testimony, and that as the accused may be prejudiced, if he is deprived of the advantage of giving evidence which may afterwards be available in mitigation of punishment, it must have been intended by implication that the magistrate should receive such evidence. In my opinion the language of the 3rd section shews the contrary, and that all that was intended was to remedy the grievance endured by persons accused, who were by reason of poverty unable to call their witnesses, by enabling them to have their witnesses bound over instead of going to the expense of subpœnaing them. The evidence

that by the section is to be taken is that of those who shall be called as witnesses by the accused person, and "who shall know anything relating to the facts and circumstances of the case or tending to prove the innocence of the accused person." The alternative here has a meaning I will afterwards refer to. Then by the latter part of the section, though the evidence of witnesses to character may be very important, quite as much so as evidence in mitigation of punishment, yet that is expressly excluded. This shews that the object could not have been as suggested to perpetuate any evidence that might be serviceable to the accused. The alternative words "anything relating to the facts and circumstances of the case or tending to prove the innocence of the accused" have in my opinion this meaning. Evidence may be material to the defence, and yet not tend to prove the innocence of the prisoner. There are many charges which include a minor offence, as for instance the charge of murder, which includes that of manslaughter. The words would include evidence tending to reduce the crime from murder to manslaughter, though not tending to prove the prisoner entirely innocent. There are many other charges to which the same observation applies, as that of robbery, which may be charged to have been committed with violence, and charges of assaults, which may be of different sorts and degrees. So a charge of libel may be of simple libel or it may be of libel aggravated by the knowledge that the libel was false.

In all these cases the accused would be entitled to call evidence to reduce the offence charged to the minor offence. And it is, in my opinion, this kind of case which the alternative words of the 3rd section, to which I have referred, are intended to cover. I see nothing in the language of the Act to shew that it was intended to enlarge the scope of the inquiry before the magistrate as suggested. The general result of the Acts seems to me to be to confine the evidence before the magistrate to evidence tending to prove the guilt or innocence of the accused, or to rebut the charge that is made. Beyond that, in my opinion, the magistrate cannot go. There cannot be a stronger illustration of this than the exclusion of evidence of character by Russell Gurney's Act. It is to be remarked that the provisions of the law as to the

1879

THE QUEEN v. CARDEN.

Lush, J.

admission of depositions at the trial in criminal cases are limited to two cases, viz., when the witness dies or is too ill to attend. If the witness runs away there is no power of reading his deposition. The depositions are to be in writing for the purpose of binding the witnesses to their statements, and for the information of the prisoner and of the judge. I do not find a word about the perpetuation of testimony, and everything that has not a tendency to prove the guilt or innocence of the prisoner or to rebut the charge is expressly excluded.

The second question is this: Mr. Russell says that, if his general contention cannot be supported, in this particular case the magistrate ought to have received the evidence as tending to shew the truth of the libel. I pause to say that it appears to me clear, on comparing the affidavits of the party accused with that of the magistrate, that the only point intended to be raised for our decision was whether, on a charge of simple libel, it is competent to the accused to prove before the magistrate the truth of the libel. I think that it is not. It is clear that when Lord Campbell's Act was passed the truth of the libel was no defence on the criminal charge. The Act enables the accused to prove the truth of the libel, but only on certain conditions. Those conditions are that he shall plead the truth specially to the indictment, and shall also allege that the publication of the libel was for the public benefit, and state the facts on which he relies to prove that it was so. Until those conditions are complied with the truth of the libel cannot be rendered available as a defence, and consequently it is beyond the jurisdiction of the magistrate to go into the question of its truth.

It is argued that, though the prisoner is not charged with publishing the libel knowing it to be false before the magistrate, a count may afterwards be added to the indictment containing this charge. That is so, but on the other hand the prosecutor might have preferred an indictment before the grand jury without going before the magistrate at all. This may be a hardship, and I hope the law may be altered in that respect. Such, however, is the law. A consideration of the sort suggested cannot, I think, authorize the magistrate to receive such evidence as the law stands. If a charge were made, of publication of a libel knowing it to be false,

1879

THE QUEEN v. CARDEN.

Lush, J.

under the 4th section of the Act, then the accused might give evidence before the magistrate in contradiction of the charge that he knew the libel to be false. To shew that he did not know it to be false he might shew that it was true. Supposing that he had proved the libel to be true the magistrate must still have committed him, but under Russell Gurney's Act the evidence would, I think, have been admissible to reduce the offence charged to the minor offence. The truth of the libel can only be admissible as a defence when it is pleaded according to the conditions specified in Lord Campbell's Act. Two cases have been cited: *Reg.* v. *Townsend* (1) *and Ex parte Ellissen.* (2) Both of those cases appear to me to have been well decided. One was a case of simply publishing a libel. The other was a case of a charge under the 4th section of publishing a libel knowing it to be false. It was competent to the defendant before the magistrates to endeavour to get rid of the major charge by proving the libel to be true. The cases are quite distinct. For these reasons I agree in thinking that the rule should be discharged.

MANISTY, J. I am of the same opinion. I think it unnecessary to say much in addition to what has been said by the Lord Chief Justice and my Brother Lush, agreeing entirely as I do with the principles which they have laid down. I think that a sufficient answer to the contentions made on behalf of the applicant may be found in the terms of Lord Campbell's Act. It cannot be doubted that, until the passing of that Act, the magistrate could have no jurisdiction to enter into any question as to the truth of the libel, and any evidence given before him to establish its truth would have been irrelevant, and could not have been the subject of an indictment for perjury. On looking to the terms of the statute it will be obvious that no change has been made in that respect. It was urged that the evidence here in question might be available afterwards in mitigation of punishment; but it is clear that this is not so. Since the great case of Sir Francis Burdett it has been well settled that affidavits of the truth of the libel cannot be received for this purpose after the conviction. It seems to me, therefore, that

(1) 4 F. & F. 1089; 10 Cox C. C. 356.
(2) Not reported, but referred to in Folkard on Libel and Slander, 4th ed. p. 592.

1879

THE QUEEN v. CARDEN.

Manisty, J.

if such evidence was received and recorded by the magistrate, the record of it would be mere waste paper. The only stage in which such evidence can be received, and the question of the truth of the libel can be gone into, is when the conditions required by the Act have been complied with, that is to say, at the trial upon a plea duly pleaded in accordance with the requirements of the statute. It is expressly enacted that except upon such plea the truth shall in no case be inquired into. In this case the inquiry has not arrived at the stage at which such a plea can be pleaded, and under these circumstances I think it is clear that evidence of the truth of the libel could not be received. Here I might well conclude what I have to say, because, on looking at the affidavit, it seems to me that this was the only question intended to be raised; but another point has been urged upon us. It is said that the evidence was admissible to shew that the alleged libel was a fair comment on the conduct of a public man. It seems to me on looking at the terms of the libel, consisting as it does of vulgar coarse abuse of an extreme character, that it could not possibly be treated as such a comment, and it would therefore be absurd and an abuse of the writ of mandamus to compel the magistrate to receive the evidence on this ground. For these reasons I agree that the rule should be discharged.

Rule discharged.

Solicitor for prosecutor: *T. A. Cox.*
Solicitor for Sir Robert Carden: *The City Solicitor.*
Solicitors for defendants: *Lewis & Lewis.*

WHITE, APPELLANT; REDFERN, RESPONDENT.

1879
Dec. 2.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Unsound Meat, Destruction of—Notice to Owner not necessary.*

The 116th and 117th sections of the Public Health Act, 1875, give power to a medical officer of health or inspector of nuisances, to seize meat, &c., exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale and intended for the food of man, which may appear to him to be diseased or unsound, and carry it before a justice, who, if it appears to him to be diseased or unsound, is to condemn the same and order it to be destroyed. The person to whom such meat, &c., belongs, is also rendered by section 117 liable to a penalty:—

Held, that meat might be taken before a justice under the above sections, and condemned without any summons or notice to the person to whom it belonged, and that such person having been subsequently to the destruction of the meat summoned and convicted of an offence under the above sections, such conviction was good.

CASE stated by the Court of quarter sessions for the county of Warwick.

This was an appeal to the Court of quarter sessions, from a conviction under sects. 116 and 117 of the Public Health Act, 1875, of which the following is a copy.

"Be it remembered that on the 13th day of May in the year of our Lord 1879, at the parish of Rugby in the said county, Thomas White was convicted before us, Edward Allesbey Boughton Ward Leigh, Esquire, and John Lancaster, Esq., two of her Majesty's justices of the peace in and for the said county, for that on the 5th day of May in the year aforesaid at the parish of Willoughby, in the said county, certain meat, consisting of the carcases of four sheep and two fore-quarters of another sheep, was found by Valentine Redfern, the Inspector of Nuisances for the Rugby Rural sanitary authority, in a slaughterhouse on the premises of the said Thomas White, there, and the said meat, being then and there deposited in the said slaughterhouse for the purpose of sale or of preparation for sale, and intended for the food of man, was then and there inspected and examined by the said Valentine Redfern, as such inspector as aforesaid, and was by him then and there found to be unwholesome and unfit for the food of man, and was by him thereupon seized, and carried away, and taken before

1879

WHITE v. REDFERN.

William Simon Haughton Fitzroy, Esq., one of her Majesty's justices of the peace for the county of Warwick; and the said meat so seized appearing to the said justice to be unwholesome and unfit for the food of man, the same was condemned by him and ordered to be destroyed, or otherwise disposed of, and we adjudge the said Thomas White, for his said offence to be imprisoned in the House of Correction at Warwick, in the said county, for the space of three months."

The appeal having been duly entered, was called on for hearing on the 3rd day of July, 1879.

Thomas White was not present when the meat was seized and carried away in order to be dealt with by the said William Simon Haughton Fitzroy, and no formal notice of its seizure was given to him before it was condemned and ordered to be destroyed by William Simon Haughton Fitzroy, although such notice could easily have been given to him. The servants of Thomas White were present when the meat was seized, and were informed by Redfern that the meat would be taken before a justice to be condemned. Redfern after he had seized the meat, and while he was conveying the same to be condemned by the justice, met Thomas White. Shortly after meeting Redfern, White arrived at his own premises and there saw his servants, and was informed by them that the meat had been so seized as aforesaid.

Thomas White did not then, or at any time, appear before the said justice, or apply to be heard on the question of the condemnation of the meat, nor did White appeal against such condemnation in any other way except by his appeal to quarter sessions against the conviction.

It was objected, on behalf of the appellant, that there could be no conviction under ss. 116 and 117 of the Public Health Act, 1875, unless and until the article seized and carried away by the inspector as unwholesome had been in due form of law, as provided by the said last mentioned sections, condemned and ordered to be destroyed by a justice, and that such condemnation and order for destruction of the appellant's property could not legally be made ex parte, and without notice to him to attend and (if he so chose) to shew cause against the same.

The Court of quarter sessions overruled the objection, and upon the evidence adduced, found that the appellant was guilty of the offence as charged in the conviction. They accordingly affirmed the conviction subject to a case.

Vesey Fitzgerald, for the respondent.

Channell, for the appellant, cited *Gill* v. *Bright.* (1)

FIELD, J. I am of opinion that the conviction should be affirmed, and that the objection which has been taken should not prevail. The point is one of some difficulty, and but for the provisions of the 308th section of the Public Health Act, 1875, giving compensation to any person sustaining damage by reason of the exercise of the powers of the Act, in relation to any matter as to which he is not himself in default, I should have had still greater difficulty. I feel very strongly the possible injustice that might be done by depriving a man of his property without giving him an opportunity of being heard, and without giving him compensation if not himself in default, and it would require very strong words in an enactment to lead me to the conclusion that it was intended that this might be done. We must consider first the general object of the Act, and then the language used. The Act is the Public Health Act, 1875, and it contains many provisions for the abatement of a variety of nuisances in the interest of the public, and among other provisions this one with regard to unsound meat. The practice of selling unsound meat is, as every one who reads the newspapers must know, a great evil, which requires prompt and stringent measures for its repression. To prevent the evil it is obvious that it may be necessary that very rapid and summary proceedings should be taken. It is necessary therefore that the power to take these measures should be intrusted to some person of authority, who will not be likely to abuse them, and who will be in a position to act promptly. Accordingly the 116th section of the Act, as it seems to me, intrusts such powers to the medical officer of health and the inspector of nuisances. Either of these officers may, at all reasonable times, inspect and examine any animal, carcase, meat, &c.,

(1) 41 L. J. (M.C.) 22.

1879

WHITE v. REDFERN.

exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, and if it appears to him to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same in order to have the same dealt with by a justice. The responsibility and the duty is imposed on him of satisfying himself that the article in question is exposed for sale, or deposited for the purpose of sale, or of preparation for sale, and intended for the food of man, and if he is so satisfied he may seize. Then is he bound to give notice to the owner before proceeding to apply to a justice to condemn the article so seized? It is contended that he is bound to give such notice; by which I suppose is meant that he must take out a summons, as is usual in the case of most proceedings before magistrates. Ordinarily such a proceeding would be necessary. The legislature generally cannot be considered to have intended that a man's property may be destroyed without giving him an opportunity of being heard, but here the paramount object would appear to be the speedy destruction of a noisome and unwholesome thing. There is nothing in the words of the 117th section, which gives power to the magistrate to condemn the article seized, to lead to the conclusion that he is to hear anybody. All he has to do apparently is to inspect the article, and if he is satisfied that it is unsound or unwholesome he is to condemn the same, and order it to be destroyed or so disposed of as to prevent its being used for food. The primary object is the prevention of an evil which in the nature of things presses for an immediate remedy. But it is not considered enough that the article should be destroyed, and the Act goes on to provide that the person to whom the unwholesome article belonged may be punished. It is conceded that, in the case of proceedings against the person, a summons must be taken out in the ordinary way In reference to such proceedings we can give effect to the provision of the 116th section, which provides that the proof that the article was not exposed or deposited for any such purpose, or was not intended for the food of man, shall rest with the party charged. These words obviously refer to a charge against the man not only against the meat. Reading the statute in this way it seems that its provisions are reasonable and intelligible.

MANISTY, J. I am of the same opinion. Looking to the provisions of the 117th section, it will be seen that, in that portion of it which gives the magistrate power to order the destruction of the meat, it contains no such reference to the meat having been exposed for sale, or deposited for the purpose of sale, and intended for the food of man, as is contained in the 116th section. All that the magistrate for that purpose is to examine into is whether it is unsound or unwholesome, or unfit for the food of man. Taking the two sections together, the provisions seem plain enough. A power is intrusted to the inspector without summoning the party or giving any notice, if he is satisfied that the article is exposed for sale, or deposited for the purpose of sale, and intended for the food of man, of seizing and taking it before a magistrate, and then if the magistrate is satisfied that it is unsound or unwholesome, he is to order it to be destroyed. The object seems to be, as pointed out by my Brother Field, the summary seizure and disposal of unsound meat. If the appellant's construction of the Act is correct, it would throw such obstacles in the way of its operation as might almost make it a dead letter. If a summons is to be taken out, where is the meat to be kept in the interval? But then the question, what is to be done after the meat is destroyed, brings in different considerations. It may be that if the party to whom it belonged is in no default, he may get compensation under s. 308. But the onus of proving that the meat was not intended for the food of man lies on him. Again, if proceedings are taken against him for a penalty, and his guilt or innocence of an offence comes in question, he must be summoned, and then by the Act the onus of proving that the meat was not intended for the food of man will rest with him. For these reasons I think the conviction must be affirmed.

Conviction affirmed.

Solicitors for appellant: *Mackeson, Taylor, & Arnould.*
Solicitors for respondent: *Iliffe, Russell, & Co., for Harris.*

1879
Nov. 27.

DANBY, APPELLANT. HUNTER, RESPONDENT.

Highway Act (5 & 6 *Wm.* 4, *c.* 50), *s.* 76—"*Waggon, Cart, or other such Carriage*"—*Cart without Owner's Name on it—Light spring Cart.*

An information was laid against the respondent for using a cart on the highway without having his name painted thereon, as required by 5 & 6 Wm. 4, c. 50, s. 76. The cart was a light spring cart with two wheels used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty under 32 & 33 Vict. c. 14, s. 18. The magistrates dismissed the information:—

Held, that the "cart or carriage" contemplated by the 76th section of 5 & 6 Wm. 4, c. 50, was "ejusdem generis" with a waggon, and that this was not such a cart, and that the magistrates were therefore right.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a Petty Sessions for the Division of Brigg, in the parts of Lindsey, in the county of Lincoln, on the 3rd day of June, 1879, an information and complaint, preferred by Thomas Danby (hereinafter called the appellant) against George Hunter (hereinafter called the respondent), under section 76 of 5 & 6 Wm. 4, c. 50, charging for that he the respondent, on the 1st day of May last at the parish of Wrawby in the parts aforesaid, then being the owner of a certain cart, unlawfully did use the same on a certain highway there situate called Wrawby Street, without having then and there and before the same was so used his name painted thereon as required by the statute in that behalf, was heard and determined.

Upon the hearing it was proved on the part of the appellant that the respondent was the owner of a cart and did use the same on the highway in question without having his name painted thereon, but on the part of the respondent it was contended that the cart which he so used was not such a "cart or other carriage" as was contemplated by the statute. It was proved by the respondent that the cart was a light spring cart used by the respondent in his trade as an agricultural implement maker, and for which he paid the annual duty of 15*s.* imposed by the statute of 32 & 33 Vict. c. 14, s. 18, on every carriage with less than four wheels. The respondent it was admitted used the said cart frequently for conveying

agricultural implements to market, as well as for driving himself and his family from place to place.

The justices being of opinion that the cart in question, being a light spring cart for which the respondent took out an excise licence, was not a cart within the meaning of the 76th section of 5 & 6 Wm. 4, c. 50, dismissed the said information and complaint.

The question of law for the opinion of the Court was, whether the cart used by the respondent as above mentioned was such a cart as comes within the meaning of the 76th section of 5 & 6 Wm. 4. c. 50, and whether the said dismissal was valid or otherwise.

Lumley, for the appellant. The intention of the 76th section of the Highway Act seems to be that carts or carriages, used for commercial or agricultural purposes upon a highway, should have the owner's name upon them, in order that there may be the means of ascertaining who is responsible for the management of them. The section occurs among various sections referring to offences on the highway, and has no reference to taxation. This carriage is found to be a cart, though a light one, and it is used for the conveyance of goods. There does not seem to be any reason why it is not within the mischief of the section. The justices seem to have thought it was exempt from the provisions of s. 76, because the respondent paid duty for it, but, although by 32 & 33 Vict. c. 14, s. 19, sub-s. 6, an exemption is given from duty to certain carts if the name is painted on them, it does not follow that they are exempt from having the name painted on them if the duty is paid upon them.

No counsel appeared for the respondent.

LUSH, J. The question is what sort of vehicle the words of the Highway Act import. It clearly cannot include every sort of carriage, as for instance, a gig. The word "carriage" must refer to vehicles "ejusdem generis" with what has gone before, viz., with a waggon. Now the vehicle is described as a light spring cart used for conveyance of the respondent's family from place to place, and it would therefore appear not to have been of any considerable

1879

DANBY v. HUNTER.

weight. It is true it was used frequently for the carriage of agricultural implements, but it seems clear that they could not have been agricultural implements of any great weight. The magistrates appear under the circumstances to have found that this vehicle was not in fact a cart or carriage within the terms of the section. I do not see why, if this cart ought to have had the name painted on it, any gig or other such carriage should not. It seems to me that the magistrates were right.

MANISTY, J. I am of the same opinion.

Judgment for the respondent.

Solicitors for appellant: *Swann & Co., for Tweed, Stephen, & Dashper.*

Dec. 4.

HAWKESLEY *v.* BRADSHAW.

Pleading—Payment into Court—Libel—Justification—Embarrassing Pleading—Order XXVII., rule 1—Order XXX., rule 1—6 & 7 Vict. c. 96, s. 2.

The defendant, in an action for a libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of certain innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper, and payment into Court of 40*s.*:—

Held, that the defence of an apology and payment into Court, and that of justification could not legally be pleaded together, or if they could the Court in its discretion would disallow the statement of defence as embarrassing under Order XXVII., rule 1.

Reed by C. of App. Post 502a

MOTION by way of appeal against an order of Field, J., at chambers, setting aside an order of Master Hodgson.

The action was for an alleged libel published in the *Nottingham Journal*. The statement of claim set out the matter complained of assigning to it various defamatory meanings by way of innuendo. The defence admitted the publication of the matter in question, but denied that it was published with, or bore, the meanings assigned to it. It then alleged that the statements published apart from the innuendoes were true. In the alternative it then pleaded that if the alleged libel was published under such circumstances as to be defamatory of the plaintiff, which the defendant

did not admit, it was published without actual malice or gross negligence in a public newspaper, and that a full apology had been published therein, and concluded by pleading the payment of 40*s.* into Court as sufficient to satisfy any damage that the plaintiff might have sustained.

The plaintiff had applied to strike out the defence as embarrassing, and Master Hodgson had made an order to that effect. Field, J., on appeal, reversed the decision of the master.

Murphy, Q.C., and *Dunn*, moved by way of appeal from the decision of the judge at chambers. It has been decided that in general payment into Court may be pleaded with pleas going to the cause of action: *Berdan* v. *Greenwood.* (1) But the judgments in that case expressly excepted the case of libel. [They also cited *Spurr* v. *Hall* (2); *O'Brien* v. *Clement.* (3)]

Graham, shewed cause. The effect of the Judicature Act and rules has been entirely to alter the old practice. Any defences, however inconsistent, may now be pleaded together without any leave being required for the purpose. Payment into Court forms no exception to the rule. It must be admitted that the Court has discretion, under Order XXVII., Rule 1, to disallow any pleading if embarrassing; but this pleading is not embarrassing. It amounts to this, viz., that apart from the innuendoes the statements of the libel are true, and if not, an apology having been given, nominal damages are quite sufficient. If the jury think otherwise the plaintiff will get a verdict for substantial damages. But assuming that they do not, it will shew that the action is one which ought never to have been brought. In any case the judge at the trial will have power over the costs, and can obviate any hardship that might otherwise arise. All cases of alternative defences in one sense are embarrassing to the plaintiff.

COCKBURN, C.J. I think this appeal must be allowed for more than one reason. Payment into court is here pleaded together with an apology in accordance with the provisions of Lord Campbell's Act (6 & 7 Vict. c. 96, s. 2), but there are also other

(1) 3 Ex. D. 251. (2) 2 Q. B. D. 615.
(3) 15 M. & W. 435.

1879

HAWKESLEY v. BRADSHAW.

defences set up, and among them a justification of the libel, apart from the innuendoes. There is nothing, so far as I can see, in the Judicature Act, or the orders made under it, that repeals or modifies the provisions of Lord Campbell's Act. By the 70th section of the Common Law Procedure Act, 1852, general provision was made for payment into court by the defendant, but the action of libel was excepted from the provision. There was, however, a proviso to the section which preserved the power of pleading payment into court under the provisions of Lord Campbell's Act. It follows that this defence could only be pleaded under the provisions of that Act. The provisions of the rules under the Judicature Act seem to me to have this effect only, that, whereas before it was necessary to get leave to plead several matters affording distinct and independent defences, now this can be done without obtaining leave for that purpose, in cases where before leave might have been obtained. I cannot help doubting whether the Judicature Act and rules ever contemplated the pleading of that which is not properly a defence, but rather an admission of the cause of action, together with facts constituting a defence to the action, or intended to do more by Order XXX. than to preserve the power of paying into court, subject to the same conditions as those under which it existed before. But, however this may be, payment into court could not have been pleaded before the Judicature Act in an action of libel, unless the conditions of Lord Campbell's Act were satisfied. It seems to me clear that that Act contemplated an admission of the cause of action, and that the defendant could not under its provisions deny the libel and then plead payment into court. It was never meant by that Act that he might defy the plaintiff to prove that the libel was untrue, and in the alternative plead that he had apologised and paid money into court. There is nothing in the Judicature Act or rules that I can see to alter the provisions in Lord Campbell's Act. The recent legislation, as I have said, seems to me merely to dispense with the necessity for obtaining leave to plead several matters, when before it could have been done with leave. Independently of the effect of Lord Campbell's Act, I think that this defence should be struck out as embarrassing, under Order XXVII. It seems to me that it is most embarrassing

that a plaintiff who has brought an action to vindicate his character should be met by alternative defences such as those set up in the present case—that the defendant should be allowed to bring into court such a sum as he may deem sufficient to represent any pecuniary damage that the plaintiff may recover, and to do so with the reservation that he still affirms the statements he has made as to the plaintiff's character. The plaintiff, if he takes the money out, must take it out subject to this reservation, and lay himself open to the unfavourable construction that he has shirked an open investigation into his character. For these reasons I think this pleading should be struck out as embarrassing.

MANISTY, J. I am of the same opinion. I cannot help doubting whether by Order XXX. it was intended to allow an admission of the cause of action and payment into court to be pleaded with a defence to the action. It is quite true that the new rules allow inconsistent defences to be set up together without leave, but payment into court is not really a defence. It reduces the matter to an assessment of damages. But of course I bow to the decision of the Court of Appeal in *Berdan* v. *Greenwood*. (1) But apart from the general question, and looking to the question as it applies to an action of libel, I do not see how the argument for the defendant can be supported, unless the provisions of Lord Campbell's Act on this subject are to be considered as repealed. The intention of that Act clearly was to give the defendant an opportunity of saying that he admitted that he was guilty of libel, but had apologised and paid money into court. It seems to me that unless that provision is repealed, and perhaps the provision of the 70th section of the Common Law Procedure Act, 1852, also, the defendant cannot be admitted to say "I am not guilty of libel, the statement complained of is true," and at the same time to pay money into court. With regard to the effect of the Judicature Act and rules, I agree with my Lord that they cannot be considered as overruling the provision of Lord Campbell's Act. I also think that, apart from the provision of Lord Campbell's Act, and assuming that that provision is superseded by the Judicature Act, this defence is embarrassing, for the reasons stated by my

(1) 3 Ex. D. 251.

1879

HAWKESLEY v. BRADSHAW.

Lord, when pleaded with other defences, such as that of justification, and should be on that ground disallowed under Order XXVII.

Appeal allowed.

Solicitors for plaintiff: *Wansey & Bowen.*
Solicitors for defendant: *Taylor, Hoare, & Taylor.*

Dec. 8.

ROBINSON & CO. *v.* DAVIES & CO.

Evidence, admissibility of—Secondary evidence of contents of written documents received under a commission to take evidence abroad without objection.

Under a commission to take evidence abroad in an action, copies of certain documents and answers of witnesses with regard to the contents of such documents were received by the commissioners in evidence on behalf of the plaintiff, without objection on the part of the defendant who joined in the commission. The copy documents were appended to the depositions and returned by the commissioners:—

Held, that the secondary evidence of the documents having been taken under the commission, without objection on the part of the defendant, was receivable before an arbitrator to whom the action was referred, and that it was too late then to take objection on the ground that the original documents were not produced.

THIS was in form an application to be allowed to revoke the submission of the action to an arbitrator. In substance the object was to obtain the opinion of the Court (as was done in *Hart* v. *Dyke* (1)), whether the arbitrator ought to receive certain evidence which he had rejected as legally inadmissible. The action was by shipowners against charterers for balance of freight. Freight was to be paid according to the charterparty on gross weight of cargo delivered at Hamburgh. The plaintiffs had received freight from the consignees at Hamburgh on the bills of lading weight. It was alleged by the plaintiffs that the gross weight of the goods delivered exceeded the bills of lading weight, and they sought to recover freight upon the difference from the charterers. A commission, in which the defendants joined, had been obtained to take the evidence of the consignees of the goods and other witnesses at Hamburgh. The defendants were not represented by counsel when the evidence was taken, but one of the commis-

(1) 32 L. J. (Q.B.) 55.

sioners was their agent at Hamburgh, and represented their interests. Copies of invoices of the goods sent to the consignees by the defendants were produced as part of the plaintiffs' evidence upon the commission, without any account being given of the originals. The copy invoices shewed the gross weight of goods delivered to be in excess of the bills of lading weight. Questions were put to the witnesses examined under the commission and answered by them relating to the contents of the copy invoices and the weight of the goods to which they referred, as appearing on such copy invoices, without any objection being then made in respect of the non-production of the originals. The copy invoices were appended by the commissioners to the depositions returned. It was sought before the arbitrator on behalf of the plaintiffs to make use in evidence of the copy invoices and the answers in respect thereto contained in the depositions, but the defendants' counsel objected to their reception in evidence, on the ground that the originals ought to have been produced or their non-production accounted for before the commission, and also on the ground that the answers related to the contents of written documents of which the originals were not produced. The arbitrator rejected the evidence, but intimated his willingness to receive it if the Court should think it admissible.

Cave, Q.C., and *Gainsford Bruce*, for the plaintiffs, moved as above-mentioned, citing *Steinkeller* v. *Newton*. (1)

J. Edge, for the defendants, shewed cause, and cited *Steinkeller* v. *Newton* (2), *Lumley* v. *Gye* (3), *Small* v. *Nairne*. (4)

LUSH, J. I entertain no doubt that the evidence ought to be received. This is not a case of any objectionable question being put, or of any interference in the matter by an unauthorized person. It seems to me quite distinguishable from the cases where the evidence was objected to on grounds of that sort. The only question is whether, no objection having been taken before the commissioners to the non-production of the original invoices, it is now competent to the defendants to object that copies only were

(1) 2 Moo. & R. 372.
(2) 9 C. & P. 313.
(3) 23 L. J. (Q.B.) 112.
(4) 13 Q. B. 840.

18 Jur 466

1879

ROBINSON v. DAVIES.

produced. It seems to me clear that if the defendants had been represented by counsel, and counsel had made no objection, no objection could be made now. If secondary evidence is received at nisi prius without objection, it cannot be objected to afterwards. The defendants did not choose to be represented by counsel, but each party was represented by a commissioner, and it was competent to the defendants' commissioner to have objected. If he had done so, and his objection had been overruled, it would have been a different thing. He made no objection, and I am clearly of opinion that it is too late to make one now.

MANISTY, J. I am of the same opinion.

Rule discharged. (1)

Solicitors for plaintiffs: *H. C. Coote, for H. A. Adamson.*
Solicitors for defendants: *Gregory & Co., for Payne & Son.*

Nov. 22.

[CROWN CASE RESERVED.]

THE QUEEN *v.* WILSON.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 12—*Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Bankruptcy—Infant.*

1864 D 111
113.7

W. was convicted under s. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for that he, within four months before the presentation of a bankruptcy petition against him upon which he was adjudged bankrupt, quitted England, taking with him, with intent to defraud, property exceeding 20*l.*, which ought by law to have been divided amongst his creditors.

At the times when he quitted England and when he was adjudged bankrupt W. was an infant. The debts proved against his estate in the bankruptcy were trade debts, contracted since the passing of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), and it did not appear that any debts for necessaries supplied to him existed:—

Held, by Cockburn, C.J., Huddleston, B., Lindley, Manisty, and Hawkins, JJ., that the conviction could not be upheld.

CASE stated for the consideration of this Court by the Recorder of Hull.

The prisoner, John Aulay Wilson, was tried on an indictment under the 12th section of the Debtors Act, 1869, charging him

(1) The rule was discharged as in the case of *Hart* v. *Dyke* (32 L. J. (Q.B.) 55), on the understanding that the arbitrator was to receive the evidence.

1879

THE QUEEN v. WILSON.

with having feloniously, within four months before the presentation of a bankruptcy petition against him, quitted England, and taken with him his money to the amount of 20*l.* and upwards, which ought by law to have been divided amongst his creditors, with intent to defraud.

The prisoner traded in Hull as a Baltic merchant. On the 19th of October, 1878, he drew out of his banker's hands, at Hull, the sum of 128*l.* in cash, and on the 27th of the same month quitted England for Sydney, and arrived at the latter place on the 2nd of February, 1879.

On the 30th of November, 1878, within four months of the prisoner having quitted England, as aforesaid, a petition in bankruptcy was presented in the Local Court of Bankruptcy at Hull against him, and he was, on the same day, adjudicated a bankrupt.

The debts proved against the estate were all trade debts, and contracted by the prisoner in his trade as a Baltic merchant. No debts for necessaries were proved against the estate, nor was it shewn that any debts for necessaries existed.

On the prisoner's part it was proved that the prisoner was born on the 13th of March, 1859. He was consequently a minor at the time of the aforesaid adjudication of bankruptcy, and at the time when he contracted the aforesaid debts which had been proved against his estate, and it was contended on his behalf that by reason of his infancy the said proceedings in bankruptcy were void; that he had not, and could not have, any creditors within the meaning of the 12th section of the Debtor's Act, 1869, amongst whom the property which he took away with him ought by law to be, or to have been, divided, inasmuch as, since the Infants Relief Act, 1874, contracts by infants, except for necessaries, are void, and that the prisoner was never liable at law or in equity for the said debts contracted during his infancy, and could not have creditors in respect of them.

The jury convicted the prisoner, and the question reserved for this Court was, whether under the circumstances stated, the conviction ought to be affirmed or quashed.

Cyril Dodd, on behalf of the prisoner, was stopped by the Court.

1879

THE QUEEN v. WILSON.

Gorst, Q.C. (*Sir J. Holker, A.G., A. L. Smith,* and *Danckwerts,* with him), for the prosecution, admitted that since the passing of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), it could not be contended that the contracts of an infant for goods supplied in the way of trade, or for money lent, were valid or resulted in debts, and that consequently the prisoner in the present case had no creditors capable of being defrauded, so far as appeared. (1)

COCKBURN, C.J. We are all agreed that this conviction cannot stand.

Conviction quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitor for prisoner: *E. Laverack, Hull.*

(1) By s. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), "If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts, or makes preparation for quitting England, and for taking with him any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable," &c.

By the Infants Relief Act, 1874, s. 1 (37 & 38 Vict. c. 62), "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statue, or by the rules of common law or equity, enter, except such as now by law are voidable."

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF MEDWAY UNION, RESPONDENTS; THE GUARDIANS OF MAIDSTONE UNION, APPELLANTS.

1879
Dec. 3.

Poor Law—Divided Parishes Act (39 & 40 *Vict.* c. 61), s. 34—24 & 25 *Vict.* c. 55, s. 3—"*Desertion*" *of Wife by Husband—Misconduct of Wife—Settlement by Residence.*

By 24 & 25 Vict. c. 55, s. 3, "where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident unless her husband return to cohabit with her."

A married woman having repeatedly committed adultery was ordered by her husband to leave his house. She left him accordingly and never returned to him, residing in a parish for such a term as would, if she had been a single woman, have made her irremoveable from and settled in it under the above section [as amended by 29 & 30 Vict. c. 113, s. 17], and 39 & 40 Vict. c. 41, s. 34:—

Held, that the wife was settled in the parish where she resided apart from her husband, for although the conduct of the husband might have been under the circumstances justifiable, there had been such a desertion of her by him as to bring the case within 24 & 25 Vict. c. 55, s. 3.

ON appeal to the Kent Quarter Sessions against an order of justices of February 18, 1879, whereby the settlement of Caroline Baldock, a pauper lunatic, was adjudged to be in Maidstone Union, and the guardians of that union were ordered to pay the past and future expenses of her maintenance in the county asylum, the Sessions confirmed the order subject to the following case.

The pauper is the wife of George Baldock, who for thirteen years last past has resided in Maidstone Union, and is thereby settled there. She was married to Baldock in December, 1840, and they lived together afterwards, residing continuously for ten years in Chatham, within the respondents' union. She committed adultery during that time, and left her husband's house for about three months, but returned to him. This occurred on three different occasions. After that she left her husband's house for a week at a time on several occasions, under the pretence that she was going to work with her sister-in-law, which her husband believed, but being informed of her misconduct accused her of it. She admitted it, and that she was in the family way by the man with whom she had committed adultery. Her husband on account of

1879

THE QUEEN v. MAIDSTONE UNION.

this misconduct shewed her the door and told her to leave his house. She left him accordingly, and was confined in the workhouse of the respondent union. She never returned to cohabit with her husband, but cohabited with various men in the parish of Chatham, and eventually she went through the ceremony of marriage on the 5th of July, 1865, with a man named Underdown, and resided continuously with him in the parish of Chatham, up to the time of her removal to the lunatic asylum on the 8th of May, 1877. Such residence was in such manner and under such circumstances as would have rendered the pauper irremoveable had she then been a single woman. From the time of her confinement until the 8th of May, 1877, she never received parish relief.

The questions for the opinion of the Court are:

1. Did the pauper lunatic acquire a settlement by residence in the parish of Chatham in the respondents' union in her own right under s. 34 of 39 & 40 Vict. c. 61?

2. Was she irremoveable from the parish of Chatham by virtue of 24 & 25 Vict. c. 55, s. 3, as amended by 29 & 30 Vict. c. 11, s. 1, at the time of her removal to the lunatic asylum, or at the time the order adjudicating her settlement, &c., was obtained by the respondents?

Kingsford, for the appellants. The order of Sessions was wrong. The facts shew such a "desertion" of the wife as to bring the case within 24 & 25 Vict. c. 55, s. 3. (1) Whether the misconduct of the wife justified the husband in the course which he took is immaterial. He had virtually abandoned her.—*Reg.* v. *Leeds* (2), the case of a child abandoned by its parents, and where it was held that it could not constructively reside with them. In *Reg.* v. *St. Mary, Islington* (3), the fact that a husband left his wife, partly in consequence of her having assaulted him, did not prevent the Court from holding that there had been a desertion

(1) By 24 & 25 Vict. c. 55, s. 3: "Where a married woman shall have been, or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her."

(2) 4 Q. B. D. 323.

(3) Law Rep. 5 Q. B. 445.

under s. 3. A desertion de facto was all that was contemplated by the section.

Winch, for the respondents. Sect. 3 does not apply to a case like the present, where the woman lives apart from her husband under a mutual agreement. *Reg.* v. *Leeds* (1) was not a case of husband and wife, but of parent and child, and has no application. To constitute desertion it must be shewn that the husband has wilfully absented himself from the society of his wife, in spite of her wish: *Thompson* v. *Thompson*. (2) Here, for anything that appears to the contrary, both parties were willing to live apart.

COCKBURN, C.J. The order of Sessions must be quashed, for I think there was such a desertion of the wife by her husband as brought the case within 24 & 25 Vict. c. 55, s. 3. This section enables a wife who has been deserted by her husband, and has resided for the prescribed period apart from him, to acquire a status of irremoveability. In the present case, the husband having discovered that his wife had repeatedly been guilty of adultery ordered her to leave his house. She did so, and resided apart from him. Now I cannot think that such a residence can be considered a constructive residence with her husband. Did she then reside apart from him under circumstances of desertion? I think we must hold that she did. There was perhaps no desertion in the ordinary acceptation of the word, but the statute must be taken to mean that, where the husband permanently gives up the society of his wife and continues to live in a different place apart from her, she shall be looked upon as a different person from what she would otherwise be, for she resides where she does for her own, and not for any marital purpose. In the construction of the section it is immaterial whether the husband is misconducting himself, or whether he leaves her in consequence of her misconduct. His residence is no longer connected with hers. He leaves her to provide for herself, and she has therefore necessarily to arrange for a separate residence.

MANISTY, J. I am of the same opinion. I think that we ought not to put too narrow a construction on 24 & 25 Vict. c. 55,

(1) 4 Q. B. D. 323. (2) 27 L. J. (P.M.&A.) 65.

1879

THE QUEEN v. MAIDSTONE UNION.

s. 3, and that it must be taken to mean that where a woman is, whether rightfully or wrongfully, sent away by her husband so as to be left as a free woman, she can so reside as to gain a settlement apart from him, unless he returns to cohabit with her. In coming to this conclusion I think it unnecessary to express any opinion as to whether 39 & 40 Vict. c. 61, s. 34, has any bearing upon the question.

Judgment for the appellants.

Solicitors for appellants: *Kingsford & Co.*
Solicitors for respondents: *Nickinson, Prall, & Nickinson.*

Dec. 6.

[CROWN CASE RESERVED.]

THE QUEEN *v.* MARTIN.

Forgery—Cheque signed in fictitious Name.

The prisoner, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own cheque drawn in his own name. At the time he drew the cheque the prisoner knew that it would be, as in fact it was, dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name:—

Held, by Cockburn, C.J., Lush, J., Huddleston, B., Lindley and Hawkins, JJ., that the prisoner was not guilty of the offence of forgery.

The resolution in *Dunn's Case* (1 Lea. C. C. 59): "In all forgeries the instrument supposed to be forged must be a false instrument in itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person," followed and approved.

CASE reserved by Cockburn, C.J.

The prisoner, Robert Martin, was convicted before me at the late assizes held at Maidstone on an indictment which charged him in one count with having forged, in another with having uttered, a forged order for the sum of 32*l.* with intent to defraud. The facts were as follows:—

The prosecutor, George Lee, is a horse dealer at Ashford, in Kent. The prisoner Martin had been formerly for many years collector of the tolls of the markets of Ashford and Maidstone and

was well known to the prosecutor. In the course of the present year the prisoner, having ceased to hold the above-mentioned offices, left the neighbourhood and went to reside in Southwark. On the 2nd of September, being again at Ashford, for what purpose did not appear, the prisoner saw the prosecutor Lee in the street in a pony cart, and accosted him, inquiring if he (Lee) had a pony for sale, whereupon the prosecutor recommended him to buy the pony he was then driving. A deal ensued, the result of which was that the prosecutor agreed to sell, and the prisoner to buy, the pony and carriage for 32*l.*

The prisoner proposing to give his cheque for the amount, both parties went into an adjoining inn, in order that the cheque might be there drawn. The prisoner then produced a printed form of cheque of the bank of Messrs. Wigan & Co., bankers of Maidstone, taken from a cheque book of which he had become possessed as a former customer of the bank. This he filled up, in the presence of the prosecutor, with the name of the latter as payee, signed it in the name of William Martin, his name being Robert, and delivered it to the prosecutor, who put it in his pocket without further looking at it, or observing in what name it was signed; after which he proceeded to give possession of the pony and carriage to the prisoner. On the ensuing morning the prisoner drove the pony and carriage to town, and, on the day after, drove to Barnet Fair where he sold both. On the cheque being presented at Messrs. Wigan's bank, payment was refused, on the ground that the signature was not that of any customer of the bank. The prisoner had been a customer of the bank, and had had an account there in his proper name of Robert Martin; but his account remaining overdrawn for some time after he had ceased to be the collector of the market tolls, and the bank insisting on the balance due to them being paid, the amount was accordingly paid on the 4th of June, and the account was then closed. No money was afterwards paid in to the prisoner's credit, nor was any cheque drawn by him. He asserted, indeed, in his defence on this charge, that he had expected money to have been paid into his account, but no evidence was adduced to shew that there was any foundation for this statement. No name was mentioned of any person owing him money, or by whom he expected money to be paid

1879

THE QUEEN v. MARTIN.

into the bank on his account. He had ceased to all intents and purposes to be a customer of the bank, and must have been fully aware that a cheque drawn by him on the bank would certainly be dishonoured. Under the circumstances there can be no doubt that the prisoner had been guilty of the offence of obtaining the prosecutor's goods by false pretences. But the indictment being for forgery of the cheque, and it appearing to me doubtful whether the charge of forgery could upon the facts proved be upheld, I reserved the case for the consideration of the Court.

In considering this question I have further to call attention to the following facts:—

The prisoner in drawing this cheque and delivering it to the prosecutor did not do so in the name of, or as representing, any other person, real or fictitious. The cheque was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert. He would equally have got credit had he signed his proper name of Robert. The credit was given to the prisoner himself, not to the name, in which the cheque was signed; the cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of William Martin, as distinguished from Robert Martin, or of any other person than the prisoner. On the contrary, if the prosecutor, who knew the prisoner's name to be Robert, had observed that the signature was in the name of William, he would in all probability have suspected something wrong, and would have refused to take the cheque.

There was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There happened, indeed, to be a William Martin, a customer of the bank; but this was unknown to the prisoner; besides which, as the prisoner was perfectly aware that his person and true name were well known to the prosecutor, it could not be supposed that he intended to pass himself off as, or the cheque as, the cheque of any William Martin other than himself. The only motive which has occurred to my mind as one which might have induced him

to sign a false Christian name is, that he may have thought that by so doing he might avoid being liable on the cheque when payment had been, as it was certain to be, refused. This, however, amounts to no more than conjecture. Be it as it may, and whatever may have been the motive, it occurred to me that while there had been a fictitious signature to the cheque in question, so far as the Christian name was concerned, yet the signature having been affixed by the prisoner, and the cheque delivered by him as his own, though there had been a signature in a fictitious name, the name could not be said to be that of a fictitious person, and that in this respect the case did not fall within the principle of the cases in which it has been held that the use of the pretended name of a fictitious person amounts to forgery. I have, therefore, sought the assistance of the Court as to whether, under the circumstances, the affixing a fictitious Christian name to this cheque by the prisoner amounts to forgery as charged in the indictment.

No counsel appeared to argue the case.

HAWKINS, J., referred to *Dunn's Case.* (1)

COCKBURN, C.J. The case is concluded by authority. In *Dunn's Case* (1) it was agreed by the judges that "in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person." Upon authority, as well as upon principle, it is clear that this conviction should be quashed.

LUSH, J., HUDDLESTON, B., LINDLEY and HAWKINS, JJ., concurred.

Conviction quashed.

(1) 1 Lea. C. C. 59.

Considered. ARDENNES (CARGO OWNERS) *v.* ARDENNES [1951] 1 K. B. 55

1879

Dec. 20.

CROOKS & CO. AND ANOTHER *v.* ALLAN AND ANOTHER.

Ship—General Average—Security for Payment—Shipowner, Duty of—Bill of Lading—General Exemption from Liability.

7 QBD 66
10 QBD 427
429,

A shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment.

The plaintiffs shipped goods at Liverpool on board a steamer belonging to the defendants under a bill of lading, by which the defendants undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded (upon the conditions before and after expressed) thence per railway to the station nearest to Toronto, &c., and among the conditions was the following: "The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, &c."

In the course of the voyage the plaintiffs' goods sustained damage which came under the heading of general average. The ship returned to Liverpool, and the cargo was discharged and handed over by the defendants to a company to be distributed and disposed of for the benefit of the parties concerned, without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged to get an average statement made out, or taking any steps to enable the plaintiffs to recover contribution:—

Held, first, that the bill of lading did not relieve the defendants from contribution to general average, and, secondly, that they were liable to an action by the plaintiffs for their omission to take the necessary steps to secure an adjustment and payment of the general average.

CASE reserved by Lush, J., at the Liverpool summer assizes, 1879, for further consideration. The facts and arguments sufficiently appear from the judgment.

Nov. 23. *Herschell, Q.C.*, and *J. C. Mathew* (*Gorell Barnes*, with them), for the plaintiffs.

C. Russell, Q.C., and *French*, for the defendants.

Cur. adv. vult.

Dec. 20. The following judgment was delivered:—

LUSH, J. The plaintiffs are the shippers of goods on board the *Sardinian*, a steamer belonging to the defendant company, for conveyance from Liverpool to Montreal. In the course of the voyage a fire broke out in the hold which made it necessary to scuttle the ship in order to protect the whole from destruction. The water

1879

CROOKS v. ALLAN.

materially damaged the plaintiffs' goods and occasioned a general average loss. The ship returned to Liverpool; the cargo was discharged and handed over by the defendants to the Liverpool Salvage Association, to be distributed and disposed of as might be most for the benefit of the parties concerned. The complaint against the defendants is that they refused to give any assistance to enable either the association, or the underwriters, or the persons whose goods were so damaged, to get an average statement made out, or to take any steps to enable the plaintiffs to recover contribution. They delivered up the cargo without taking the usual security from any of the owners of cargo, and the plaintiffs were not only without the benefit of such security, but without the means of ascertaining in what proportions the several cargo owners were liable to contribute, or even who, besides the defendants, were the contributing parties. The defendants' reason for adopting so unusual a course avowedly was because they considered the ship not liable to contribution; and they based their claim to immunity from general average on a clause in the bill of lading.

By this instrument, the defendants undertake to deliver the goods at the port of Montreal (unless prevented by certain specified perils), unto the Grand Trunk Railway, by them to be forwarded "upon the conditions before and after expressed," thence per railway to the station nearest to Toronto, and at the said station delivered to the consignees at a through tonnage freight. Then follow a number of minute stipulations and exemptions, amongst which is the following: "The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance; nor for any claim notice of which is not given before the removal of the goods, nor in any case for more than the invoice or declared value of the goods whichever shall be the least." This case is, in my opinion, not distinguishable from *Schmidt* v. *The Royal Mail Steamship Company*. (1) Although the words "fire and the consequences thereof," which are the words relied on in that case, are here found in the previous enumeration of perils, the words in question must like those be construed to have reference to and to qualify their

(1) 45 L. J. (Q.B.) 646.

1879

CROOKS v. ALLAN.

liability as carriers. I adopt the words which I used in that case, and repeat that "the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and is not concerned with liabilities to contribution in general average," and unless the contrary appears, the words used must be so construed. The argument receives additional force in the present case from the fact that, in the clause in question, the carriage on board the ship and the carriage by railway are linked together. Goods may be damaged in their transit in ship or on the railway, but general average contribution can only arise in respect of damage on ship.

It was stated by the counsel for the defendants in the course of the argument, that these words were introduced in order to get over the case just referred to, and to relieve the shipowner from general average contribution. If the words fairly bore that construction, another and a more serious question would have arisen; a question which might equally have arisen if the claim was one strictly within the meaning of this clause. The long list of excepted perils and the much longer list of exemptions and qualifications of which the clause in question is one, and which seem designed to exonerate the shipowners from all liability as carriers, and to reduce them substantially to the condition of irresponsible bailees, are printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice. If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution—a clause which not only deprives the shipper of an ancient and well understood right, but which might avoid his policy and deprive him also of recourse to the underwriter, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. A bill of lading is not the contract, but only the evidence of the contract; and it does not follow that a person who accepts the bill of lading which the shipowner hands him, necessarily and without regard to

circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms. Notwithstanding the concluding sentence of these small typed thirty lines, which says, "In accepting this bill of lading, the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed," I should have thought it right if the stipulation in question bore the meaning contended for to give the plaintiffs an opportunity of supplying by means of an official inquiry, information as to the circumstances under which the goods were shipped and the bill of lading was taken, and whether the special clauses of this remarkable document were brought to their notice, or were read by them before they accepted it. It is unnecessary in the present case to ascertain these facts, because the clause has not the meaning which the defendants ascribe to it, and the only question is the liability of the ship to contribute.

The next question is whether a shipowner is bound to exercise the power he is invested with, when a general average loss has arisen, and to afford the means in his power for adjusting the average claims and liabilities and secure their payment to the parties entitled. It seems strange that such a point has not been formally decided in this country. It has been decided in America in favour of the shipper. I am not aware that it has ever been judicially questioned here, and I can only account for the absence of direct authority by supposing that the universal practice has been accepted as proof of the obligation. It is clear that the shipowner has a lien for general average on the whole of the cargo liable to contribution, and can require before he parts with it, security for its due payment. In early times the master, when he had jettisoned part of the cargo to save the whole adventure, took and rendered contribution in kind. The ordinary course now is and has been for a very long time, for the shipowner to require before he delivers the cargo, an average bond or agreement

1879

CROOKS v. ALLAN.

for the payment of what shall be found due from each shipper for his proportion of the loss. He is the only person who has the power to require this security.

The right to detain for average contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with this law, and has become part of the common law of the land.

I am therefore of opinion, first, that the bill of lading does not exempt the shipowner from contribution to a general average loss, and secondly, that he is liable to this action for not having taken the necessary steps for procuring an adjustment of the general average and securing its payment. This is all which I am required to decide, and my judgment will therefore be entered for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*

Solicitors for defendants: *Gregory, Rowcliffe, & Co.; agents for Hill & Dickinson, Liverpool.*

Dec. 9.

COULTHART [PUBLIC OFFICER OF THE STALYBRIDGE, HYDE, AND GLOSSOP BANK] *v.* CLEMENTSON AND ANOTHER.

Principal and Surety—Guarantee, continuing—Notice of Death of Guarantor—Revocation.

A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor.

CASE reserved by Bowen, J., at the Liverpool summer assizes, 1879, for further consideration.

The nature of the action, facts of the case, and the arguments, sufficiently appear from the judgment.

Dec. 4. *Channell*, for the plaintiff.

C. Russell, Q.C., and *Crompton*, for the defendants.

Cur. adv. vult.

Dec. 9. The following judgment was delivered :—

BOWEN, J. This is an action brought by a bank upon a continuing guarantee against the executor of a deceased guarantor.

Messrs. E. & J. Clementson, cotton-brokers and spinners in the county of Chester, had a banking account with the bank of which the plaintiff is the registered public officer. In the year 1867 the bank required security for the advances which were likely to be made to Messrs. E. & J. Clementson, and on the 24th of August, 1867, a written guarantee was executed by Nathaniel Lawton, the deceased, and the defendant Joseph M. Clementson, who is now Nathaniel Lawton's executor (and sued as such).

The material part of the guarantee is as follows :—

"We, the undersigned, Joseph Moxon Clementson, of Dukinfield, in the county of Chester, cotton-spinner, and Nathaniel Lawton, of Micklehurst, flannel manufacturer, do hereby jointly and severally undertake and agree to guarantee to the proprietors of or partners in the said banking co-partnership for the time being the due and punctual payment when required of all such sums of money as may have been, or may be from time to time, advanced or paid by or from the said banking co-partnership, or which the same co-partnership may have already paid, or become liable to pay, or may hereafter pay or become liable to pay for or on account of the said Edward and John Clementson, or their order, on any account whatsoever, with interest, commission, and other banking charges upon such sums. . . . . And we jointly and severally further agree as follows, namely, that this guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until three months after notice to the manager of the said banking co-partnership in Ashton-under-Lyne in writing under our hands of our intention to discontinue or determine the same."

Advances were duly made by the bank under this guarantee down to the death of the testator, Nathaniel Lawton, on the 19th of December, 1875, at which date the firm of Messrs. E. & J. Clementson were considerably indebted to the bank. It was admitted, however, that sufficient sums of money after notice of the death had been paid into the account, and generally appropriated to the current account, to cover any balance which was in

1879

COULTHART v. CLEMENTSON.

fact owing at the date either of the death or of such notice. Upon the other hand, if the guarantee was not determined in law by death or notice of the death of the testator, it was admitted that the bank, who continued their advances up to May, 1878, to the firm of E. & J. Clementson, were entitled to recover under this guarantee a large sum of 3000*l.* or thereabouts, which, in case of difference, is to be settled hereafter by a referee.

The cause was tried before myself and a special jury at Liverpool, when it was agreed that the jury should be discharged, and that the Court should have power to draw all reasonable inferences of fact.

The evidence as to what had passed between the bank and the defendant as Nathaniel Lawton's executor after Nathaniel Lawton's death is not very clear. From a feeling of mutual courtesy the parties refrained from cross-examination of one another at the trial.

It appeared that the bank knew of the death of Mr. Lawton, but had received no written notice of it addressed specially to themselves. On the 12th of February, 1876, however, the defendant as executor had published in the proper newspapers advertisements under 22 & 23 Vict. c. 35, requiring the creditors of the deceased Nathaniel Lawton to send in particulars of claims to the solicitors of the executors on or before the 14th of May, 1876. The bank and their officers were cognizant of this advertisement, as well as of Nathaniel Lawton's death.

Under the testator's will one-third of his estate was to be in trust for the children of the testator's sister Sarah who should attain twenty-one years in equal shares, one-third for the children of his deceased brother John Lawton who should attain twenty-one, and the remaining one-third to the brother of the testator, M. H. Lawton. Some of the children were minors. M. H. Lawton, before any claim made by the bank, got his share and spent it.

It was admitted that the bank knew who were the executors, and that, without knowing the terms of the will, the bank knew that the estate was going, one-third of it to the testator's brother, and two-thirds to the children of the testator's brother and sister, some of whom were infants.

The defendant, who was a brother of the partners in the guaranteed

firm, Messrs. E. & J. Clementson, had become liable to the bank as a guarantor jointly and severally with Nathaniel Lawton under the guarantee in question. He called at the bank shortly after the appearance of the advertisements, and saw the manager, Mr. Coulthart. The following is the account given by the defendant of the interview: "I went to the bank to see if they could advance some money on a large public building, the Conservative Hall, and Mr. Coulthart agreed to do so. Then he said, 'I see by the notice in the paper that your brother-in-law is dead. Do you know that you are responsible for 3000*l.*;' and I was not aware of it, but was quite agreeable to be so, knowing my brother to be in good circumstances. He asked me how they were doing. I told him I knew all their affairs, and told him they were doing as well as they could be doing at the time. That is all that passed to the best of my recollection. We should never have paid the share out if we had thought it was subject to liability."

The defendant was not cross-examined, but it was stated on behalf of the bank that Mr. Coulthart's recollection of the conversation differed from the defendant's, and by consent a written memorandum of the interview made by Mr. Coulthart at the time was put in as containing the substance of the evidence which Mr. Coulthart was prepared to give, and was to be taken as if he had actually deposed to it.

The memorandum was as follows:—

"Mr. Clementson called, and said he would sign a new letter of guarantee for 4000*l.* or allow the existing ones to continue, as might be most agreeable to the directors."

In May, 1878, the guarantee firm, Messrs. E. & J. Clementson, fell, as I have stated, into difficulties. The bank to whom they were indebted heavily for advances, exceeding the amount of the guarantee, claimed under the guarantee to be repaid the same by the defendant as executor of the testator, and brought this action.

For the defendant it was contended that the testator's estate was not liable for any advances made after the testator's death, or, at all events, after the bank received notice of his death. For the bank it was argued that no notice was given which was equivalent to a notice of the withdrawal of the guarantee, and that

1879

COULTHART v. CLEMENTSON.

the proper inference to be drawn from these facts was that the bank had a right to and did still suppose that the guarantee was to continue.

If it were established that, after the death of the testator the parties had dealt together on the footing that the guarantee was at an end, the case of *Harriss* v. *Fawcett* (1) would apply, and the defendant's bank would not be liable. But I do not decide this case on that ground, though I am not convinced, on the present materials alone, that the bank may not, after the testator's death, have been looking to the defendant's liability as joint and several guarantor on the guarantee, and have considered the guarantee determined as regards the testator and his estate.

It is possible, on the other hand, that the executor himself supposed the guarantee to be at an end, while the bank entertained no definite opinion on the subject. It would be difficult for me to express any clear view about the matter, as the evidence leaves me still in some doubt about it. It is not necessary, if my judgment be well founded, to decide the point.

I am of opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned, of the guarantee. A guarantee like the present is not a mere mandate or authority revoked ipso facto by the death of the guarantor. It is a contract, and the question from what time and on what notice it ceases to cover advances is a question of construction of the contract itself. In the case of such continuing guarantees as the present, it has long been understood that they are liable, in the absence of anything in the guarantee to the contrary, to be withdrawn on notice. Various explanations have been offered of this reasonable, though implied, limitation. The guarantee, it has been said, is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made. This explanation has received the sanction of the Court of Common Pleas in the case of *Offord* v. *Davies*. (2) Whether the explanation be the true one or not, it is now established by authority that such continuing guarantees can be withdrawn on notice during the

(1) Law Rep. 15 Eq. 311; 8 Ch. 866.

(2) 12 C. B. (N.S.) 748; 31 L. J. (N.S.) (C.P.) 319.

lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guarantee irrevocable and to go on for ever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's estate a limitation which is read into it to protect him while he is alive. On the argument of the present case it was virtually conceded that the provision as to three months' notice relating only to the guarantor's life, and there being no corresponding provision as to the notice to be given on his death, the guarantee could be legally determined at any time after the guarantor's death by a proper notice to that effect. But there remains the question what is the proper notice to be given. To answer this question we must consider the change which the guarantor's death has effected in the situation. The notice cannot any longer be given by the guarantor. He is dead. The executor of his will is guardian of his estate, and if notice is to be given by any one, the executor would seem the person to give it. But must the executor give special notice that the guarantee is withdrawn; or is it not enough that the bank should be warned of the death of the testator and the devolution of his estate to others? In many cases the executor has no option to elect to continue the guarantee. Surely it would in such cases be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue. Notice of the death and of the existence of a will is notice of the existence of trusts which may be incompatible with the continuance of the guarantee. If indeed, under the testator's will, the executor has the option of continuing the guarantee, then from the absence of any specific notice of withdrawal, the bank may, perhaps, in spite of notice of the death, properly assume, as against the estate, that the guarantee is not to be determined. But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guarantee by notice cannot any longer be a giver of notices; that his estate has passed to others, who have trusts to fulfil, and it is easy for them to ascertain what those

1879

COULTHART v. CLEMENTSON.

trusts are. If these trusts do not enable the executor to continue the guarantee then the bank has constructive notice that the guarantee is withdrawn. If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself; and such a provision will, of course, bind the estate. Here there is no such provision.

Judgment will, therefore, be entered for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Milne, Riddle, & Mellor.*
Solicitors for defendants: *Johnson & Weatherall.*

Dec. 18.

THE QUEEN *v.* THE INSTITUTION OF CIVIL ENGINEERS.

Poor Rate—Exemption from Rateability—"Society instituted for purposes of Science, Literature, or the Fine Arts exclusively"—6 & 7 Vict. c. 36, *s.* 1.

A society, the primary object of which is the acquisition and advancement of scientific knowledge for the purposes and in the interests of a particular profession, such as that of civil engineers, is not a society instituted for purposes of science exclusively, within the 1st section of 6 & 7 Vict. c. 36, and consequently is not entitled to exemption from rating under that statute.

CASE stated by the Middlesex quarter sessions, in an appeal against a poor rate for the united parishes of St. Margaret and St. John, Westminster, made upon the premises occupied by the appellants, the Institution of Civil Engineers.

It appeared that in 1828 Thomas Telford, a fellow of the Royal Societies of London and Edinburgh, and others, had formed themselves into a society "for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade as applied in the construction of roads, bridges, aqueducts, canals, river navigation, and docks for internal intercourse and

exchange, and in the construction of ports, harbours, moles, breakwaters, and lighthouses, and in the art of navigation by artificial power for the purposes of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns." A charter of incorporation had been obtained by the society, and power was given to the members of the corporation by their charter to hold general meetings, which were empowered to make such bye-laws as they should deem to be useful and necessary for the regulation of the corporation, for the admission of members, for the management of the estates, goods, and business of the corporation, &c.

By the bye-laws so made it was provided that under no pretence whatever should the property or income of the corporation be applied in making any dividend, gift, division, or bonus unto or between any of the members. In conformity with the bye-laws no such dividend, gift, division, or bonus was ever made by the institution unto or between any of its members. Although the institution derived part of its yearly income from investments, it was substantially supported by the annual contributions of its members. The appellants occupied the rated premises for the transaction of their business and for the carrying into effect of their purposes. They maintained a library there, consisting of works bearing on the purposes of the institution, as specified in the charter, and of works bearing on science in general, and also a reading-room, wherein periodicals of a similar character were provided for the use of the members. The reading-room was also supplied with certain daily newspapers. They also used the premises for the purposes of a collection of maps, engineering publications, and plans and drawings of engineering works from all parts of the world. Models were occasionally exhibited when papers were read to illustrate the subjects of the papers, but there was no permanent model-room or collection of models. The council of the institution were in the habit of inviting communications or papers upon such subjects as those set forth in the annual report of the institution annexed to the case. Such papers were read at the meetings, and discussion upon them followed, and the papers were afterwards printed and circulated among the members.

BIBL. LONDIN UNIV.

1879

THE QUEEN v. INSTITUTION OF CIVIL ENGINEERS.

The appellants also granted certificates or diplomas to all members shewing the status of each in the institution.

An institution called the Benevolent Fund of the Institution of Civil Engineers, was conducted by a committee of the members, and its business was allowed to be transacted at the premises of the institution. [The facts with regard to the use of the premises for the purposes of this benevolent institution are not given in full, because, as will be seen, the judgment of the Court did not turn on those facts. The bye-laws and annual report of the institution were made part of the case, and such parts of them as are material will be found referred to in the judgment of Manisty, J., *post*, p. 55.] The appellants claimed exemption from rateability as a society instituted for the purposes of science, literature, or the fine arts exclusively within the meaning of 6 & 7 Vict. c. 36. The court of quarter sessions decided that the institution was a society established for the acquisition of all the knowledge which may be useful to the persons practising in this country the profession of a civil engineer and not exclusively for the promotion of scientific knowledge, and that its objects and pursuits were not such as to bring it within the 1st section of 6 & 7 Vict. c. 36, and entitle it to exemption. They accordingly confirmed the rate, subject to a case.

Nov. 8, and 14. *Meadows White, Q.C.*, and *Glen*, for the respondents.

Sir Henry James, Q.C., *Poland*, and *Mead*, for the appellants.

The following authorities were referred to during the argument. *Earl of Clarendon* v. *St James', Westminster* (1); *Russell Institution* v. *St. Giles, and St. George, Bloomsbury* (2); *Purvis* v. *Traill* (3); *Purchas and the Cambridge Philosophical Society* v. *Parish of Holy Sepulchre* (4); *Reg.* v. *Zoological Society of London* (5); *Reg.* v. *Overseers of Manchester* (6); *Reg.* v. *Cockburn* (7); *Birmingham, Churchwardens of*, v. *Shaw* (8);

(1) 10 C. B. 806; 20 L. J. (M.C.) 213.
(2) 3 E. & B. 416.
(3) 3 Ex. 344; 18 L. J. (M.C.) 57.
(4) 4 E. & B. 156.
(5) 23 L. J. (M.C.) 139.
(6) 16 Q. B. 449; 20 L. J. (M.C.) 113.
(7) 16 Q. B. 480.
(8) 10 Q. B. 868; 18 L. J. (M.C.) 89.

Reg. v. *Brandt* (1); *Reg.* v. *Jones* (2); *Reg.* v. *Royal Medical Society.* (3)

Cur. adv. vult.

Dec. 18. The following judgments were delivered.

FIELD, J. This is a case stated by the Court of quarter sessions for the county of Middlesex, and the question asked of us by the Court is, whether the appellants are entitled to claim exemption from the payment of their share of the money to be raised by local taxation on the ground that they are exempted from rateability by operation of the Act 6 & 7 Vict. c. 36, as a society instituted exclusively for the "purposes of science, literature, or the fine arts," and whether the premises occupied by the appellants were, at the time of the rate, exclusively used for any of such purposes. Upon the argument, the numerous cases in which the statute relied upon has been the subject of judicial decision were ably and succinctly brought before us, and although at the time of the argument I entertained very little doubt as to what my decision ought to be, I have considered it right to go carefully through the authorities before delivering my judgment. The result is to make the case in my mind a very plain one. The clear object of the Act (although as has been observed, the language of it is not as definite as it might have been), is to encourage persons to associate themselves together, and by voluntary subscription to raise a fund, by means of which subjects of science, literature, and the fine arts may be discussed, and a knowledge of them widely diffused, so as to extend and promote the general knowledge and refinement of society at large. Whether such a result should have been sought at the expense of a limited area of the body politic rather than by imperial taxation is not the question. The statute has said that such is to be the case, and we have only to construe its meaning. The object, however, of the enactment and its limitation exclusively to matters of science which may be useful or of advantage to the body politic at large, and not to the advantage or pleasure of any particular body or association, is shewn by the prohibition of any

(1) 20 L. J. (M.C.) 119. (2) 8 Q. B. 719; 15 L. J. (M.C.) 129.
(3) 30 L. T. (O.S.) 133; 21 J. P. 789.

1879

THE QUEEN v. INSTITUTION OF CIVIL ENGINEERS.

dividend or personal gain to the members of the society. It is further made clear when it is observed that, whereas in dealing with purposes of science and literature, the language of the enactment is large enough to include all science and literature whether abstract and pure or applied to any particular object, yet, in dealing with "art" which without any addition might mean either pure "art" or an art or mystery professional, or handicraft, the legislature adds the limitation "fine," to point out the limitation I have adverted to. In the case of "art," therefore, the limited object of the statute is clearly expressed, and so in the case of science and literature the same limitation ought to prevail. In the hands of the philosopher and man of science and literature, "science," although practically applied for the purpose of experiment and advancement of the general state of knowledge, is so applied without any material or substantial intention of advantage or gain or enjoyment by the individual, whereas "science" seems to me to cease to be science within the meaning of the exemption when it is acquired, communicated, or made use of for the purpose of being applied or used for the individual object, advantage or gain of the members of the associated body. The "science" as applied by the manufacturer or engineer is, no doubt, still "science" generally, but it is not the science which the legislature intended to exempt from local taxation.

That this is so I think clear upon principle, and the authorities cited, taken as a whole, bear out this view. No doubt it has been thought that the Court of Queen's Bench in some of the earlier cases carried the exemption to at least its fullest limits, but all the later cases are in favour of its stricter limitation. The application of the rule therefore becomes in each case a question of fact—what is the purpose of the institution claiming exemption? Is it instituted purely and exclusively for purposes of science as I have defined it, or is it primarily and essentially instituted for the acquisition, enjoyment, or advancement of, or education in the knowledge of the art or profession of the members comprising the association? It may be perhaps that the discussion of science in any shape is as productive of advantage to, as that of literature is of enjoyment by, the individuals who compose the institution; but if the advancement and acquisition of science taken generally is

the main and substantial object of the association, then the necessary concomitant of advantage and enjoyment to the individual does not destroy the exemption. And, in like manner, if the primary and substantial purpose of the institution is the advantage and gain of a particular body of professional men exercising a professional art by which to earn their livelihood, the fact that those objects are gained by the discussion and promotion of such science as if applied to their art will advance their individual and professional interests will not protect the society from taxation.

For the purpose of deciding under which head the institution in question must be ranged, I have carefully considered the terms of their charter and bye-laws, and the purposes for which their premises are used, and I cannot but come to the conclusion that neither the purpose nor the use is within the meaning of the legislature as giving exemption. I find from the charter and bye-laws that it calls itself an institution of "civil engineers," of the members and intending members of which profession it is substantially composed, and the slight admixture of persons other than members of their profession or their pupils does not destroy that limitation and distinctive character. Again, I find that all the science and literature to which the charter refers converge upon one point, the education and advancement of its members in the particular professional art of a civil engineer in which they are engaged, and by which they earn or are to earn their living. That this is the substantial purpose of the institution as expounded by the charter and bye-laws is shewn by the report of the council, which also shews the purpose for which they use the rateable hereditament, for we find that out of a gross income of upwards of 11,000*l.* upwards of 5000*l.* is devoted to the advancement of professional objects and interests. I might point out besides other elements of the purposes for which the society's premises are used which seem to me to tend in the same direction, and which lead me to the conclusion that the "science," for the diffusion of which the lectures and papers serve, is auxiliary and subordinate to the main professional object of the institution. There was, however, one particular use of the premises, viz., that by the committee of the benevolent association, a body which almost admittedly did

1879

THE QUEEN v. INSTITUTION OF CIVIL ENGINEERS.

not come within the exemption, upon which I promised to express an opinion if my decision in favour of the respondents rested upon it. But as my judgment has so much broader a scope I prefer not to express my opinion upon it. The result therefore is that I hold the institution not to be exempt and give judgment in favour of the respondent parish.

MANISTY, J. The question in this case is, whether the premises occupied by the Society of Civil Engineers in Great George Street, Westminster, are exempt from local rates.

The appellants contend that civil engineering is a science, within the meaning of 6 & 7 Vict. c. 36, and that the primary object of their institution is the advancement of that science, all else which they do being incidental and ancillary to that object, consequently they are exempt from rates for relief of the poor.

The respondents contend, first, that whether civil engineering in the abstract be or be not a science within the meaning of the Act (which they deny), the primary object of the society is the instruction of its members in various subjects in which it is useful for them to be instructed, in order that they may be the better qualified to practise their profession of civil engineers.

Secondly, they contend that assuming the appellants would otherwise be entitled to exemption, they are not so entitled because they permit a society or institution called "The Benevolent Fund of the Society of Civil Engineers" to meet and transact their business in the premises in question.

It is well settled by a number of authorities, which were cited in the course of the argument, that in deciding whether any particular society is within the Act regard must be had to the primary purpose for which it was founded.

The Court of quarter sessions came to the conclusion upon the facts proved that the Institution of Civil Engineers is a society established "for the acquisition of all that knowledge which may be useful to persons practising in this country the profession of a civil engineer, and not exclusively for the promotion of scientific knowledge, and that its objects and pursuits were not such as to bring it within the Act, and entitle it to exemption."

1879

THE QUEEN v. INSTITUTION OF CIVIL ENGINEERS.

In that conclusion I concur. So far as the question is one of fact, it would be enough to say that there was evidence for the consideration of the justices, but I do not see how they could properly have come to any other conclusion either in fact or law for the following reasons:—

The purpose of the society is stated in their charter of incorporation to be "for the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states both for external and internal trade as applied in the construction of roads, bridges, aqueducts, canals, river navigation, and docks for internal intercourse and exchange, and in the construction of ports, harbours, moles, breakwaters, and lighthouses, and in the art of navigation by artificial power for the purposes of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns." The bye-laws and regulations of the society state under the head of "Objects," that the institution was established for "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer."

Under the head of "Constitution" they state that "the Institution of Civil Engineers shall consist of three classes, viz., members, associates, and honorary members, with a class of students attached." Students are defined as "persons not under eighteen years of age who are or have been pupils of members or associates of the institution, and who have the object or intention of becoming civil engineers."

Each student who resides within ten miles of the General Post Office pays 2 guineas, and each other student pays $1\frac{1}{2}$ guinea per annum. The income derived from this source in the year 1877 was 800*l.*

The list of "Subjects for Papers" in the session 1877–78, comprises fifty subjects, including: (3) The Manufacture of Cements, comprising the Processes followed in different Countries; (4) The Manufacture of Bricks by Machinery; (9) The Con-

1879

THE QUEEN v. INSTITUTION OF CIVIL ENGINEERS.

struction of Warehouses and other Buildings to resist Fire, &c.; (10) The Warming and Ventilation of large Buildings; (14) The Benefits and Expedients of Irrigation in India and in other Warm Climates; (37) The Manufacture of Mineral Oils and the Lamps best adapted for their Consumption in Dwellings and Lighthouses; (38) The Output of Coal in the United Kingdom as compared with that of other Countries illustrated by Statistics shewing where Coal is produced, where and how it is consumed, and the relative quantities exported.

Several other subjects of a similar character will be found on reference to the list.

I am clearly of opinion that a society, having for its primary purpose the edification and instruction of its members and students in sundry arts (more especially if they are not fine arts), with the view of enabling them the better to practise a particular profession, is not a society established exclusively for purposes of science, literature, or the fine arts, within the meaning of the Act 6 & 7 Vict. c. 36.

That such is the primary purpose of the Institution of Civil Engineers, having regard to their charter and bye-laws as well as usage, I cannot doubt. On this ground, and for these reasons, I am of opinion that judgment must be given for the respondents, consequently it is unnecessary to say anything on the second point taken on their behalf.

Judgment for the respondents.

Solicitors for appellants: *Hallowes, Price, & Hallowes.*
Solicitor for respondents: *Warrington Rogers.*

FORWOOD *v.* THE NORTH WALES MUTUAL MARINE INSURANCE COMPANY.

1879
Dec. 20.

Ship—Marine Insurance—Policy and Bye-laws, Construction of—Constructive Total Loss—Insurance confined to "absolute Damage caused by the Perils insured against."

A policy of marine insurance on ship effected with a mutual insurance company incorporated certain bye-laws of the company endorsed thereon. The policy (inter alia) expressed it to be thereby declared that the acts of the assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment. One of the bye-laws provided that, in the event of any ship being stranded or damaged and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company should be deemed, or taken to be, an acceptance or recognition of any abandonment of which the assured might have given notice to such company, and the company under any circumstances should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured:—

Held, by Lush, J., on further consideration, that the effect of the bye-law was not to exclude a constructive total loss, but that it contemplated a partial loss only, and was intended to deprive the assured of the right he would otherwise have to claim extraordinary expenditure by way of salvage or otherwise in addition to the cost of repairs.

Affirmed by Ct of Appl 4 QBD 557. Ca

ACTION upon a policy of marine insurance on ship in respect of a constructive total loss. The trial took place before Lush, J., who reserved the case for further consideration. The facts sufficiently appear from the judgment.

Herschell, Q.C., and *Gorell Barnes*, for the plaintiff.
Russell, Q.C., and *Trevelyan*, for the defendants.

Cur. adv. vult.

Dec. 20. LUSH, J. The only question raised before me in this case is whether the defendants are liable upon the policy stated in the pleadings for a constructive total loss. It is candidly admitted in the statement of defence that the vessel was, while the policy was in force, damaged by perils of the sea to such an extent that the cost of repairing would have amounted to more

1879

FORWOOD v. NORTH WALES MUTUAL MARINE INSURANCE CO.

than the ship would have been worth when repaired. That a prudent uninsured owner would not have repaired her, but would have sold her unrepaired, and that the plaintiff within a reasonable time gave notice of abandonment, that in effect there was a constructive total loss; but the contention of the defendants is, that the policy read in connection with the bye-laws excluded such a liability and confined the assured in such a case as this, where the ship remained and might have been repaired as a ship, to claim as for a partial loss only.

There is nothing in the policy itself which sanctions such a defence. It states, that in consideration of the person effecting it agreeing to become a member of the company, and to pay all contributions and other sums which in respect of such insurance shall become payable to the company, and in all other respects to observe and perform all things to be observed and performed on the part of the assured, according and subject to the bye-laws indorsed thereon, the company insured, lost or not lost, 1000*l.* on the ship valued at 3600*l.* After enumerating the perils insured against, it expressed it to be thereby declared and agreed that the acts of assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment.

This is the whole of the policy, and so far from favouring the notion that constructive total loss was to be excluded, it assumes the contrary, and in view of such an event protects the assured, on the one hand, from being supposed to have waived his abandonment and to have resumed the property by endeavouring to save it from utter destruction; and protects the assurer, on the other hand, from having any attempts which he might make for the same purpose interpreted against him as an acceptance of the abandonment. The argument, therefore, rests on the 24th bye-law, which is taken to be incorporated in the policy. It is not necessary to consider what would have been the rights of the assured if the bye-law had been at variance with anything found in the policy, for I am of opinion that the bye-law does not affect to deal with a constructive total loss but with a different state of things. The first bye-law directs the form of the policies, and the bye-laws are indorsed upon it, and it would be strange if

either of those bye-laws should contain anything contradictory of, or inconsistent with, the policy. Any construction which the words admit of must be adopted rather than this. There is, however, nothing ambiguous in them. They are, "Every loss by stranding or otherwise shall, without delay, be made known to the manager, and all protests, vouchers, surveys, and other statements relating thereto shall be sent to the manager and laid before the directors, and be subject to the stipulations contained in these bye-laws. In the event of any ship being stranded or damaged, and not taken into a place of safety, it shall be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and any owner or his representative refusing the co-operation of the agents of this company for the safety of such ship, shall suffer a deduction of not less than 25 nor over 50 per cent., as the directors shall determine, in the settlement of the claim. And it is hereby provided that no acts of the company or its agents, under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company; and the company, under any circumstances, shall only pay for the absolute damage caused by the perils insured against, which in no case is to exceed the sum insured."

The object of this bye-law undoubtedly was to limit the amount which the company would have to pay in the event of damage by the perils insured against, not, however, as I think, by excluding constructive total loss, but, in the first place, by securing the prompt removal of the damaged ship to a place of safety; and, secondly, by depriving the assured of the right he would otherwise have to claim any extraordinary expenditure by way of salvage, or otherwise, in addition to the cost of repairs. To this end it requires immediate notice of the loss to be given to the company, and empowers the company to take upon themselves the office of salvors, without compromising their right to question the propriety of any abandonment which might have been made, and to charge the assured his proportion of the expense. The proviso shews that the rule has no reference to a total loss, but contemplates a

1879

FORWOOD v. NORTH WALES MUTUAL MARINE INSURANCE CO.

partial loss only; and the last clause, upon which the company mainly rely, declares that the cost of repairs only shall in such case be recoverable. The alternative, in my opinion, is not between partial and total loss but between cost of repairs simply and cost of repairs plus salvage or other expenditure incurred in conveying the ship to a port of refuge.

I am, therefore, of opinion that, upon the question submitted to me, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitors for plaintiff: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Forshaw & Hawkins.*

Aug. 4.

[IN THE COURT OF APPEAL.]

PHILIPPS *v.* PHILIPPS AND OTHERS.

Practice—Taxation of Costs of Appeal before termination of Action.

An application by a defendant in an action in the Queen's Bench Division, to strike out the statement of claim as embarrassing, having been refused by a Divisional Court, the defendant appealed, and the Court of Appeal made an order "that the judgment of the Court below be reversed with costs of this appeal and of the proceedings in the Court below." The defendant applied to the master to tax the costs, which he declined to do on the ground that they were costs of an interlocutory application, and that the taxation must stand over till the termination of the action:—

Held, by the Court of Appeal, that the practice of the Common Law Divisions to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal, and that under an order of the Court of Appeal directing payment of costs, without any intimation that the taxation and payment are to be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith.

THIS was an action in the Queen's Bench Division, for the recovery of land. The defendants took out a summons to strike out the statement of claim as embarrassing. The master refused to make any order. The case then came before Field, J., at chambers, who took the same view. The defendants appealed to the Queen's Bench Division, and on the 28th of November, 1878, the Divisional Court affirmed the judge's order. The defendants then

appealed to the Court of Appeal, and on the 19th of December the Court made the following order (see 4 Q. B. D. 127).

"That the judgment of the Court below be reversed with costs of this appeal and of the proceedings in the Court below. And that the plaintiff's statement of claim herein be struck out; and it is further ordered that the plaintiff be at liberty to deliver a fresh statement of claim within six weeks."

On the 19th of February, the defendants' solicitor served the plaintiff's solicitor with notice to tax costs under this order. The parties attended before Master Hodgson, who declined to tax the costs on the ground that they were costs of an interlocutory application, and that the taxation must stand over till the termination of the action. The defendants then applied by summons to Field, J., at chambers, for a reference to tax the costs, but the application was refused.

The defendants thereupon gave notice of motion before the Court of Appeal, that the master might be directed to tax the costs, and that the plaintiff might be directed to pay them within two days after such taxation.

Whitehorne, for the application. The order of the Court of Appeal directing payment of costs ought to be at once obeyed. It is true that in the Common Law Divisions the practice has prevailed of having no taxation of costs till the termination of the action, but the saving of the old practice as to costs in the Order in Council of the 12th of August, 1875, rule 28, cannot bear upon the effect to be given to an order for costs made not by a Divisional Court but by the Court of Appeal.

Mackenzie, contrà. The court will not give a direction to the master which is wholly inconsistent with the settled practice of the division.

[BRETT, L.J. How do you make out that the common law practice is to be imported in construing orders of the Court of Appeal?]

The action is not taken out of the Queen's Bench Division, the order becomes an order of the High Court to which the action is remitted; and the master who has to act upon it must proceed

1879

PHILIPPS v. PHILIPPS.

according to the practice in the division in which the action is carried on.

JAMES, L.J. We are not interfering at all with the practice of the Divisional Court as to its own orders and as to taxation under them. This was an order made by the Court of Appeal sitting at Westminster; there not being two Courts of Appeal, one at Westminster and one here. By this order the Court of Appeal thought fit to direct that the costs of the appeal should be allowed to the appellants, and that they also should have the costs of the proceedings below. That order of the Court of Appeal ought to be obeyed, and, if nothing is said to the contrary, an order directing costs to be paid means, according to my understanding of it, that they shall be taxed and paid forthwith. If there was any reason why the taxation or payment of the costs should not be made forthwith, but should be postponed to the hearing of the cause, it would have been very easy for the Court on the application of any party to have added words for that purpose. There ought to be but one practice in the Court of Appeal, whether the action is brought in one division or in another, and certainly as far as the Court of Appeal has dealt with cases that have come before me, it has been the intention, in making an order for payment of costs, that the costs should be taxed forthwith and paid forthwith, unless the contrary is expressed or implied in or by the form of the order. That being so, it appears to me that the costs ordered by the Court of Appeal to be paid ought to have been taxed and paid. I do not at all mean to say that this is to govern the taxation and payment of costs so long as they remain costs in the Divisional Court. We have nothing to do with that on the present occasion. All that we have now to say is, what is the proper mode of carrying into effect an order of the Court of Appeal. I was not a party to the decision, but their Lordships were, and they agree that this was what was intended by the order. No doubt the taxing master, when he knows what was the meaning and intention of the order of the Court of Appeal, will act upon that order exactly in the same way as if words directing the costs to be taxed and paid forthwith had been inserted.

1879

PHILIPPS v. PHILIPPS.

BRETT, L.J. We are not asked to give any opinion about the practice of the Divisional Court, nor are we asked to interpret any order of the Divisional Court. If there be an appeal from chambers to a Divisional Court on an interlocutory matter, and if there be an order of the Divisional Court upon that interlocutory matter with regard to costs, there is a practice no doubt in the Divisional Court, but we have nothing to do with that on the present occasion. Here the Court of Appeal has made an order that the judgment of the Court below be reversed, with costs of the appeal and of the proceedings in the Court below. That is an order of the Court of Appeal, and the only question is, what is the meaning of that order? That cannot be determined by any practice of the Divisional Court, but must be determined by the practice of the Court of Appeal. The question is, what is the meaning of the order with regard to the time when the costs are to be taxed? By the universal practice of the Court of Appeal, when an order is drawn up in this form it means that the costs shall be taxed immediately. Words directing immediate taxation and payment are impliedly in the order by reason of the constant and universal practice of the Appeal Court. It follows, therefore, that these costs ought to be taxed immediately; and it cannot be doubted that, when the opinion of the Court of Appeal as to the meaning of the order is made known to the master of the Queen's Bench Division, that master will act upon the order in the sense and according to the meaning that is given to it by the Court which made it.

COTTON, L.J. The only question which we have now to consider is what ought to be done under an order expressed in the terms of the order now before us, that is to say, what did the Court of Appeal direct? It is an order that the costs of the appeal and the costs of the proceedings in the Court below be paid by the plaintiff to the successful party, the defendants. That, according to the natural meaning of its terms, is an order for immediate payment, and consequently for immediate taxation, because when costs are to be paid at once, it is the duty of the proper taxing officer at once, upon the request of the successful party, to proceed with the taxation of them. I speak from recollection, but I think

1879

PHILIPPS v. PHILIPPS.

I am right in the recollection that orders have been made in the Court of Appeal sitting at Westminster directing that the payment and taxation of the costs directed by the order to be paid should be postponed until the action came to an end; and if that had been the intention in the present case, I think the order would have taken that form, or would in some other way have shewn that the costs were not to be settled forthwith. There is only one Court of Appeal, and this order in the Court of Appeal sitting at Lincoln's Inn certainly would have the meaning which I attribute to it, and as there is another form of order known in the Common Law Divisions, which the Courts of Appeal might have adopted, by which payment and taxation are expressly postponed, my opinion is that the intention of the Court, as expressed in this order, was that the costs should be paid forthwith, and that therefore it becomes the duty of the master forthwith to tax them.

We are not laying down any general rule as to what is to be done in the Divisions of the High Court, nor laying down any rule to be followed by the Court of Appeal. All we say is, that an order in the form of the order now before us is to be taken as expressing that the costs are to be paid forthwith, and that, therefore, under such an order, it becomes the duty of the master forthwith to tax the costs of the successful party.

Motion allowed.

Solicitor for plaintiff: *Herbert W. Reeves.*
Solicitors for defendants: *Iliffe, Russell, Iliffe, & Cardale.*

[IN THE COURT OF APPEAL.]

1879
Aug. 4.

STIRLING *v.* DU BARRY.

Practice—Order LIV., rule 6—Appeal from Chambers.

An order having been made in chambers on the 20th of June, the defendant, on the 24th, gave notice of appeal to a Divisional Court for Saturday, the 28th. The Court sat on the 26th to hear motions, and was sitting on the 28th, but not for the purpose of hearing motions. The defendant brought forward his motion on the 30th, being the next day on which the Court sat to hear motions :—

Held, affirming the decision of the Queen's Bench Division, that the appeal motion was out of time, since a Court to which an application to enlarge the time could be made had been sitting within the eight days.

THIS was an action for assault. No statement of defence having been delivered judgment by default was signed, and damages were assessed before the under-sheriff of Middlesex. The jury gave 10*l.* damages. The under-sheriff, on being applied to, declined to certify for costs, and recommended an application to a judge at chambers.

An application was accordingly made, and Field, J., on the 20th of June, 1879, ordered that the defendant should pay the plaintiff his costs of the action.

On the 24th of June the defendant gave notice of motion in the Queen's Bench Division that on the 28th, or so soon thereafter as counsel could be heard, the Court would be moved to set aside Mr. Justice Field's order with costs.

The Divisional Court sat to hear motions on Thursday, the 26th, and it was sitting on Saturday, the 28th, but did not take motions on that day. The motion was brought forward on the 30th, and was refused as being out of time. The defendant appealed.

Cock, for the defendant. Under Order LIV., rule 6, General Order of the 22nd of March, 1879, the appellant was in time. Notice was given in due time, and that the application was not heard, was only owing to the fact that the Court did not take this class of business on that day, so the appellant was in no default. The rule appears to have been made to remedy the hardship in *Runtz* v. *Sheffield*. (1) *Forrest* v. *Davis* (2) is in the defendant's favour.

(1) 4 Ex. D. 150. (2) Weekly Notes, 1878, p. 88.

1879

STIRLING v. DU BARRY.

W. Graham, contrà. The rule was intended to apply only where an appellant has had no opportunity of either moving or getting the time enlarged. The Court heard motions on Thursday, the 26th, and the appellant might have moved then, or, as Lush, J., said, he could on Saturday have got the time extended.

JAMES, L.J. I am of opinion that the decision appealed from is right. If the rule had stood in its original form, providing that the motion should be made within eight days, the application would clearly have been out of time. The amended rule provides that "if no Court to which such appeal can be made shall sit within such eight days," then the motion may be made on the first day on which any such Court shall be sitting after the expiration of the eight days. The argument for the appellant is that we ought to read the rule as if it had run "shall sit for the purpose of hearing motions." There is no reason for doing this. The appellant chose to run the risk of giving his notice of motion for the last day, though he knew that the Court would not in its ordinary course sit to hear motions on that day, and knew that there was an opportunity before that day of applying for an extension of time, of which opportunity he did not avail himself.

BRETT, L.J. The argument for the appellant goes too far. The Court actually was sitting for the purpose of hearing motions within the eight days. The addition to the rule was made, as I think, because it was possible that an order might be made by a judge at chambers, and no Divisional Court might be sitting within the eight days, so that the party might, under the original rule, lose his right of appeal, although he had no opportunity either of moving or of applying for an extension of time. I think the addition to the rule was only intended to give relief where no court was sitting to which an application for time could be made.

COTTON, L.J. I agree with my learned Brothers in the construction of the rule.

Appeal dismissed.

Solicitor for plaintiff: *Charles Robinson.*
Solicitor for defendant: *Thomas J. C. L. Bordman.*

[IN THE COURT OF APPEAL.]

1879
July 30.

THE QUEEN *v.* THE BURIAL BOARD OF BISHOP WEARMOUTH.

Burial Ground—18 & 19 *Vict. c.* 128, *s.* 18—*Expenses of repairing Burial Ground closed by Order in Council.*

The churchyard of the parish of W. having become insufficient for the purposes of burial, a detached piece of land was in 1838 conveyed to the commissioners under the Church Building Acts as an addition to it. The parish of W. consisted of the township of W. and five other townships, each of these six townships having separate overseers and a separate poor-rate. The above piece of land, which was situate in the township of W., was used as the burial ground for the whole parish until 1854, when it was closed by Order in Council, and a burial board for the township of W. was formed:—

Held, that, under 18 & 19 Vict. c. 128, s. 18, where a burial ground is closed by Order in Council, if it is a churchyard it must be kept in order by the churchwardens, and if it be a cemetery formed by a burial board, then by the burial board; and that therefore the ground in question, being a churchyard, was to be kept in order, not by the burial board, but by the churchwardens:—

Held, also, that the expenses of keeping the ground in order were to be repaid to the churchwardens out of the rate for the township of W., being a place having a separate poor-rate within which the ground was situate, and not out of the rates of all the townships composing the parish of which it had been the burial ground.

THIS was an appeal by the burial board of Bishop Wearmouth from a decision of the Queen's Bench Division, making absolute a rule for a mandamus against the appellants, commanding them to repair a disused burial ground known as the Gill Cemetery.

The parish of Bishop Wearmouth comprises the township of Bishop Wearmouth and five outlying rural townships. Each of these six townships has its own poor-rates, and its own overseers of the poor. The whole parish had originally a single churchyard, which was its only burial ground. This having become insufficient, additional ground was provided at different times, and in 1838 a portion of the glebe land containing 4*a.* 37*p.* was given by the then rector for the purpose of additional burial ground. This new burial ground was in the immediate neighbourhood of, but not actually thrown into, the old churchyard, and was commonly known as "The Gill Cemetery." It appeared by evidence produced on the appeal that it had, by deed dated the 14th of March, 1838, been granted by the rector to the commissioners

1879

THE QUEEN v. BURIAL BOARD OF BISHOP WEARMOUTH.

under the Church Building Acts. It was situate within the township of Bishop Wearmouth, and formed a burial ground for the use of the whole parish. It was thus used until, on the 13th of September, 1854, an Order in Council was made for closing it.

In 1856 a burial board was formed which, though styled the burial board for the parish of Bishop Wearmouth, was in fact a burial board solely for the township of Bishop Wearmouth, the other townships in the parish declining to concur in the appointment of a burial board for the whole parish. At a meeting of the board on the 6th of April, 1859, a resolution was passed that the board should assume the care and charge of the Gill Cemetery, and keep the same in order out of the funds of the board.

At a meeting of the burial board held on the 2nd of April, 1873, the resolution of the 6th of April, 1859, was rescinded, and the board thenceforth discontinued the care of the cemetery, which fell into a state of disrepair. In 1878 some of the inhabitants of the neighbourhood addressed a memorial on the subject to the Home Secretary. The board, upon being applied to by a number of inhabitants of the township, refused to do anything, stating that, as a burial board representing the township of Bishop Wearmouth only, they declined to maintain the cemetery which belonged to the whole parish.

Proceedings were thereupon taken, by direction of the Home Secretary, to obtain the decision of the Queen's Bench Division on the question of liability, and on the 13th of January, 1879, a rule nisi was obtained for a mandamus commanding the burial board to put the Gill Cemetery in repair, and maintain it in repair. On the 11th of June, 1879, this rule was made absolute, the Court being of opinion that there was such a degree of uncertainty about the facts as made it desirable to have a return to the writ, so that the case might be on the record. The burial board appealed.

Herschell, Q.C., and *Moulton*, for the appellants. The point turns on 18 & 19 Vict. c. 128, s. 18. The fair construction of that clause is that the burial board shall keep the ground in order if it belongs to a burial board, and if it does not then the churchwardens. This section was in force before the burial board

was in existence, on whom then did it impose the liability? Surely on the churchwardens of the whole parish. It would then be a strange thing if this liability was shifted in 1856 from the churchwardens to the board. Although by the interpretation clause "parish" may mean any place having a separate poor-rate that does not exclude its primary meaning: *Reg.* v. *Sudbury Burial Board.* (1)

Sir H. Giffard, S.G., and *A. L. Smith*, for the Crown. It is immaterial to the Crown who is bound to repair this ground, provided that somebody does it. There is a difficulty about holding the churchwardens to be the persons liable, for although this ground has undoubtedly been used as a parish burying ground, it does not appear that it ever was legally added to the churchyard, and the burial board took care of it for seventeen years. The section appears to apply to all burial grounds, including those of Dissenters, and it cannot be supposed that it was intended that churchwardens should repair them. The order is a matter of discretion and is not appealable: *Reg.* v. *Churchwardens of all Saints.* (2)

[JESSEL, M.R. That was under the old course of procedure. The Judicature Acts make every order appealable.]

That appears to be so.

[JESSEL, M.R. In whom is the freehold vested?]

Under 3 Geo. 4, c. 72, s. 26, and 8 & 9 Vict. c. 70, s. 13, it appears to be vested in the incumbent if the provisions of the Acts have been complied with. This does not give the churchwardens power to interfere.

[JESSEL, M.R., referred to Coke Inst. part 2, p. 489, as to the obligation of parishioners to repair the churchyard.]

The intention of the Act appears to be, that where the ground is a churchyard and the churchwardens have control they are to do the repairs; and the best interpretation of s. 18 is that if there is a board the board is to do the repairs; if there is no board somebody must do them, and so the Act fixes on the churchwardens.

[JESSEL, M.R. That is a peculiar way of construing the words "as the case may be."]

(1) E. B. & E. 264. 4 Jur. N.S. 948 (2) 1 App. Cas. 619.

1879

THE QUEEN v. BURIAL BOARD OF BISHOP WEARMOUTH.

It is, however, comparatively immaterial who is to do the repairs, the substantial question is who is to pay for them; and it is very desirable that the Court should give an opinion on that point.

Moulton, in reply. The argument that the enactment applies to all burial grounds, whether public or private, is disposed of by *Reg.* v. *Burial Board of St. John's, Westgate* (1), which decides that the clause only applies to the burial ground of a parish.

JESSEL, M.R. After the full discussion which has taken place, and looking at the fresh materials before us, I think there is now no necessity for a case being stated on the record. The facts appear to me to be sufficiently proved to enable us to come to a conclusion.

The case is in some respects a singular one. It appears that in the parish of Bishop Wearmouth there are six townships, each of which has its own overseers and separate rates for the relief of the poor. It appears also that there is an ancient church with a churchyard, which was the burial place of the parish, and this having been found to be insufficient it has from time to time been added to in various ways. When I say added to I do not mean that there was a physical addition, but an addition in point of accommodation. One of the additions was a portion of the glebe which is now called the Gill Cemetery, and which appears to have been conveyed in 1838 to the Church Building Commissioners, and which by virtue of the Act 3 Geo. 4, c. 72, s. 26, and the subsequent Act of 8 & 9 Vict. c. 70, s. 13, has become vested in the rector or parson of the parish for the benefit of the parishioners, and to be used as a burial ground or place of interment. I take it that before the passing of the Burial Board Acts that cemetery so used would have been properly described as a churchyard, whether it were actually adjoining to or separated from the old churchyard. It was the regular place of burial for the parishioners; it was the church place of burial; it was vested, as I said before, in the parson for the use of the parishioners; and it appears to me that both according to common parlance, and according to legal phraseology, it would properly be described as a churchyard.

(1) 2 B. & S. 703.

Indeed the words cemetery and churchyard are identical. The Latin of "churchyard" is "cemeterium," and if we go to Johnson's Dictionary we find that a churchyard is either a place adjoining a church or a cemetery.

Now that being so, and the facts being as I have stated, the question is what is the meaning of the 18th section of 18 & 19 Vict. c. 128? [His Lordship read the section.]

The first point that was suggested on the part of the Solicitor-General was that this applied to any burial ground, not only burial grounds for the use of the parish, but burial grounds belonging to Dissenters, persons not members of the Established Church, Quakers, and Jews, who had private burial grounds of their own. It however appears to have been decided by the Exchequer Chamber in *Reg.* v. *Burial Board of St. John's, Westgate* (1), that by reason of the "words churchyard, or burial ground of any parish," that is not so, and if I may respectfully say so, I concur with the decision. I think we should be equally bound by it, whether we concurred with it or not, but I concur with it because you would not describe a proprietary burial ground as the burial ground of a parish.

That being so, there are only two classes of burial grounds to which the section can possibly apply; the one class is what I may call the church burial ground, that is the churchyard or church cemetery, and the other is the burial ground formed by the burial board. Those are the only two burial grounds that can be called parish burial grounds.

Now, when we get two classes of burial grounds, and two only, I think it is not difficult to see to what the words "as the case may be," refer. I think they must mean that where it is the church burial ground, or churchyard, then the churchwardens are to repair, but where it is the burial board burial ground, or parliamentary burial ground, then the burial board is to repair. If that is so the churchwardens are the persons liable under this section to maintain in necessary repair the walls, &c., of this particular cemetery.

It is said, however, that this does not decide the question how the costs of repair are to be borne. That is so, and I think it

(1) 2 B. & S. 703.

1879

THE QUEEN v. BURIAL BOARD OF BISHOP WEARMOUTH.

right to give an opinion as to the latter part of the section, that there may be no further litigation upon the subject, and it is also necessary to consider the construction of that part of the section, because it may be said that it affects in some degree the construction of the former part of the section.

It is to be noticed that the charge for the repair is thrown upon the ratepayers of the parish or place in which the churchyard or burial ground is situate. Now, it is quite possible that a burial ground may be outside the parish for which it is the burial ground, but still the legislature, for some reason or other, has enacted in plain words that the expenses of its repair are to be paid out of the rate for the relief of the poor of the parish or place in which such churchyard or burial ground is situate.

Now, it is quite plain that this particular ground is situate in one of the five townships. Of course it is also situate in the whole parish. Then the question is who are to pay. If we look at the words we find that the expenses are to be repaid by the overseers, and they are to be repaid by the overseers on the certificate of the burial board or churchwardens out of the rate. Are they then to be repaid by the overseer of the district in which the cemetery is situate, or by the five sets of overseers for the five districts which constitute the parish? There is no power of apportionment among the five sets of overseers. The enactment obviously contemplates the payment by the overseers of one district who are to levy one rate. That being so, and not forgetting the definition clause of the former Act which is imported into this Act, that "parish" shall mean, that is shall include, any place having separate overseers with separate poor rates, it is plain to me that the persons to pay are the ratepayers of that district, having separate rates for the relief of the poor, in which the burial board is situate. The result, therefore, will be that the churchwardens are to repair, and the ratepayers of the township in which the burial ground is situate are to pay for the repair. The rule for the mandamus must be discharged, and the costs must follow the result.

BRETT, L.J. In this case I do not consider that we are overruling the decision of the Queen's Bench Division. A prerogative mandamus was asked for, and the Queen's Bench has decided that

it should go in order that a return might be made, but they gave no opinion as to whether the mandamus would finally be maintained or not.

The rule upon which the Queen's Bench invariably acted in such cases was that, if the case was one of general interest and there was considerable doubt as to the law, they allowed the mandamus to go and a return to be made, in order that the case might be taken to a Court of Appeal, or, if the facts were not sufficiently ascertained, they allowed the mandamus to go and a return to be made, in order that the facts might clearly appear upon the record. It may be that one reason for allowing a mandamus to go will have become obsolete by reason of the Judicature Act, because where the only reason is that the case is one of general interest there may be an appeal to the Court of Appeal and thence to the House of Lords upon the question of the discretion of the Court in granting a mandamus, it being no longer necessary that the facts should appear upon the record for the purpose of giving an appeal. The other reason, however, is still in existence. If the facts are not, in the opinion of the Queen's Bench Division, sufficiently ascertained, they may still insist that the facts should be stated clearly upon the record, and if there had not been a peculiarity in this case I should have thought it very difficult to interfere with that discretion of the Queen's Bench Division. But I think it has appeared before us here that the facts are practically not now in dispute, and the parties wish that the Court should at once give an opinion upon the question of law and the construction of the statute. So that, without saying what we should have done if the parties had insisted strictly upon arguing the question, whether the Queen's Bench Division had properly exercised its discretion in ordering a return to the mandamus, it seems to me that we may properly give our opinion on the merits.

With regard to the construction of the statute, I agree with what the Master of the Rolls has said. But for the case of *Reg.* v. *Burial Board of St. John's, Westgate* (1) it would have been open to argument that the construction of this section was in accordance with the suggestion of the Solicitor General, which, as it seems to

(1) 2 B. & S. 703.

1879

THE QUEEN v. BURIAL BOARD OF BISHOP WEARMOUTH.

me, would have been a more simple construction, and one which would have carried out further the sanitary objects of the Act. That decision seems to have decided that the burial grounds mentioned in this section are the parliamentary burial grounds of parishes. We are bound by that decision whether we should have come to the same conclusion or not, but I confess that the reasons given for it appear to me to be unimpeachable. It follows that as to the first part of the section the construction is, that when a parliamentary burial ground is closed by Order in Council it is to be put in order and kept in order by the burial board; but that if a churchyard is so closed it is to be put in order and kept in order by the churchwardens. I think, also, that it is now made out clearly enough upon the affidavits that this particular piece of ground was a churchyard, and not a burial ground, within the meaning of the section. That being so, it is the churchwardens (and the only churchwardens in the present case are the churchwardens of the whole parish) who must put it into decent order.

Then comes the question who are finally to pay the expenses. Now, this churchyard is situate within the township of Bishop Wearmouth. The township is one which has overseers and a separate poor-rate. I think the true construction of the second part of the section is that the expenses are to be paid out of the rate made by the overseers of the township in which this churchyard is locally situate, a rate made by them upon the inhabitants of the township and not upon the inhabitants of the parish at large.

COTTON, L.J. If this had been really a case of the exercise of a discretion by the Court below, I should have had some hesitation in interfering with that discretion; but I understand it is simply this: the Court below considered that the facts were not before them in such a way that they could decide the questions at law arising in the case. Now, after the discussion we have had, and the facts brought before us upon the affidavits, we think that the facts are sufficiently before us to enable us to decide that question. We are therefore no more interfering with the discretion of the judges, in any sense in which a Court of Appeal ought not to inter-

fere with that discretion, than would be the case if on a demurrer to a bill the Court below declined to decide the question, and directed that the question should stand over till the hearing, and the Court of Appeal thought it could decide the question upon the demurrer. There are many cases where, when the Court below has exercised its discretion, the Court of Appeal is very reluctant to interfere, but where the Court below thinks that the facts are not stated sufficiently clearly to enable it to decide the question, then if the Court of Appeal thinks that they are stated with sufficient clearness it is, in my opinion, the duty of the Court of Appeal to decide the question of law, and so to put a stop to unnecessary litigation between the parties.

In the present case there is only one question immediately before us, but two questions have been raised, namely, to whom can a mandamus go, and by whom is the expense ultimately to be borne?

The first question to be considered is whether or no the burial board can, under the circumstances of this case, be required to take the first step. Now the 18th section, on which, taken in conjunction with the rest of this series of Acts, the question turns, has been decided to apply only to burial grounds of a parish, and then, as the Master of the Rolls says, there are two classes of burial grounds for a parish. There is the church burial ground and there are the burial grounds which, under the provisions of this and the previous Acts, might be provided for the parish or parishes, or places coming within the description of a parish in these Acts, by a burial board, and I agree with the Master of the Rolls that this section deals with parochial burial places and divides them into two classes, those which have been provided under the provisions of the burial Acts by means of a burial board, and those which are not provided by a burial board but are provided by the church, and are described as the churchyard. I think, then, that the fair interpretation of the section is this, that where a parish burial ground provided for the parish by the burial board is closed, then this section imposes on the burial board the duty of keeping it in order; but as regards the burial ground attached to the church that then it looks to the churchwardens, who, if they were not compellable to do so, did in fact look after

1879

THE QUEEN v. BURIAL BOARD OF BISHOP WEARMOUTH.

and provide for the maintenance and protection of the burial ground of the church.

I will just advert to one argument used for the purpose of persuading us that this was not a churchyard. "Churchyard" is sometimes not a very appropriate word for those places to which it is applied. Primâ facie a churchyard is the ground in which the church stands, and usually until that is full the church burials are in that burial ground; but "churchyard" is used also, though not very accurately, to denote the burial ground of the church, although it is in fact separated from, and at some distance from, the church. Church burials usually take place in the churchyard —that is to say, the ground surrounding the church. Therefore, wherever places appropriated to church burial are found, they are in common parlance called churchyards. The ground now in question, though not originally part of the yard in which the church was, but added to it under the circumstances we have heard, is in ordinary parlance and within the meaning of this Act of Parliament, a churchyard. It was said that it was a cemetery, but cemeterium is really the latin word for churchyard; and I would refer to 35 Edw. 1, which was to prevent the cutting down of trees in churchyards, and which is headed, "Ne rector prosternat arbores in cemeterio," shewing that it was a word used for the churchyard It was, in fact, a Greek word signifying the place where the dead sleep, and was appropriated primâ facie to the churchyard. It is now more commonly used for burial places not appropriated as churchyards; but still the mere fact that this ground, on its appropriation for burial, was described as a cemetery can have no possible effect in shewing that it is not to be considered a churchyard within the meaning of the section.

That being so, and this being in my opinion a churchyard, it is upon the churchwardens that the order ought to go to do what is necessary for keeping it in decent order; but that there may be no misunderstanding as regards the liability to provide for the expenses, we ought, I think, to state what our opinion is as to the funds out of which the churchwardens are to be repaid. The latter part of the section says: "And the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the

relief of the poor of the parish or place in which such churchyard or burial ground is situate." The township in which this ground is situate has a separate rate for the relief of the poor, the parish consists of separate townships, and there are several rates for the relief of the poor, and the only place in which this burial ground is situate, and in which there is a rate for the relief of the poor, is the township. It appears to me, therefore, that the expense is to be borne by the township. It is true, that before this churchyard was closed the whole parish had the benefit of it; but what we are now dealing with is the expense of the churchyard after it is closed and can no longer be used for the benefit of the whole parish. The whole object of these Acts enabling churchyards to be closed by Order in Council, and to be considered useless as places of burial, was the health of the immediate neighbourhood, for the Act under which the Order in Council for closing this burial ground was made expressly mentions the protection of public health as the ground for making such orders. The order, then, was made for the benefit of the health of the inhabitants of the place in which the churchyard was situate; and that, in my opinion, is the reason why the expense of keeping a disused place of burial in repair is thrown upon the inhabitants of the township where it is situate, and not upon the persons who formerly had the benefit of it, but who do not derive any benefit from its being closed. In my opinion, although the churchwardens are the persons who are to be called upon to repair and keep in order this burial ground, they are to be recouped out of the rate made for the relief of the poor made for the particular township in which it is situate.

Appeal allowed.

Solicitors for appellants: *Maples, Teesdale, & Co.*
Solicitor for the Crown: *Solicitor to the Treasury.*

1879
July 28.

[IN THE COURT OF APPEAL.]

PHILLIPS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Damages, Insufficiency of—New Trial—Compensation for Pecuniary Loss from Personal Injury.

A new trial will be granted, in an action for personal injuries sustained through the defendants' negligence, where the damages found by the jury are so small as to shew that they must have omitted to take into consideration some of the elements of damage.

Consideration of the directions proper to be given to a jury as to the damages to be awarded to the plaintiff for the bodily suffering arising from personal injuries, and the damages to be awarded to him for loss of professional income arising from those injuries.

THIS was an appeal by the defendants from a decision of the Queen's Bench Division directing a new trial. (1) The application was made on the ground of insufficiency of damages and misdirection. The Court granted a new trial on the former ground only.

The action was brought by Dr. Phillips, a physician in Grosvenor Square, against the London and South Western Railway Company to recover damages in consequence of an alleged negligent act of their servants in bringing about a collision on the 8th of December, 1877, between the train in which Dr. Phillips was being carried to London, and a light engine which was on the same line of rail.

The case was tried before Field, J., and a special jury.

The learned judge in his summing up, after stating the nature of the case, proceeded as follows: "As a matter of law the principle of damages is not very well defined, and if I may say so, I am inclined to think purposely so, because in this country, be it right or wrong, the public like to be judged by their fellow public, and not always to have the minds of lawyers to judge between two men of ordinary life and habits. In a question of damages like this it seems to me that the law means to bring in the habits, thoughts, feelings, and general knowledge of things, which are

(1) 4 Q. B. D. 407.

S Ca aff from verdict & new trial
but 286

brought to bear by taking twelve honest, independent men, chosen indifferently, and putting them into the box to consider what sum one man ought to pay to another for an injury. With regard to contracts there is no difficulty. If I contract with you to sell you so much sugar at such a price, and I do not do it, and you are obliged to spend double the money in getting the sugar, you put down the figures, and say the damage you have sustained is so much, and that is what I must pay. If I contract with you on a bill of exchange, I must pay the amount and the interest upon it, because I have contracted to pay that. In those cases there is no difficulty whatever in the principle of damages. But when you come to questions like the present, which involve personal injury, the measure becomes more difficult. The only principle, if I may use the word, which applies to contracts is this, that you must, as a rule, give a man compensation by way of damage for the loss he has, in the ordinary and natural course of things, suffered from the breach of contract. But it has been pointed out for centuries, and it is the principle of foreign jurisprudence as well as ours, that in actions for personal injuries of this kind, as well as in many others, it is wrong to attempt to give an equivalent for the injury sustained. I do not mean to say that you must not do it, because you are the masters and are to decide; but I mean that it would operate unjustly, and in saying so I am using the language of the great Baron Parke, whose opinion was quoted with approval in *Rowley's Case.* (2) Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered.

"Now, originally there were two questions which stood before you for decision. The plaintiff alleges that the defendants by their negligence caused this injury. There was a denial of that.

(2) Law Rep. 8 Ex. 231.

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

The facts are short, and although there is no question now for you upon it, still it is desirable that you should see how it was that the accident happened. [The learned judge here briefly stated the circumstances.]

"Now, undoubtedly, it would have been very difficult to have contended, when all the evidence was taken, that there was not negligence on the part of the company, and the counsel for the company exercised a sound judgment in giving up the point. The only importance of adverting to the circumstances is this, that there is nothing in them which calls for any expression on your part, by way of verdict, of any vindictive feeling, if I may use the word, against the company. It is not a case in which they grossly neglected their duties, but an accident has happened through a wrong proceeding on the part of some of their servants arising from possibly good motives, or natural motives. [The learned judge then referred to the evidence as to the state of the plaintiff, the result of which was that there was no hope that he would ever be able to resume his profession or even recover so far as to have any enjoyment of life, and proceeded:—] Now with regard to the pecuniary position, it is this, the plaintiff has been making an income of between 6000*l.* and 7000*l.* You will have to consider under the head of damages, first of all, the pain and suffering to him. That of course is a matter which you must take into account, as it is a fair matter for compensation. An active, energetic, healthy man is not to be struck down almost in the prime of life, and reduced to a powerless helplessness with every enjoyment of life destroyed and with the prospect of a speedy death, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but with the view of giving him a fair compensation for the pain, inconvenience and loss of enjoyment which he has sustained. Then, after you have considered what sum you think it is right to award on that ground, the next head which you have to consider is the amount of expense which he actually incurred. [The learned judge then adverted to the items of expenditure amounting to 923*l.*, the main item being a journey taken to the south of France by the advice of his medical attendants.]

"Now we come to the most difficult portion of the case and that

is the question of the loss of income. There is comparatively no difficulty about it up to the present time, because the plaintiff has undoubtedly already lost a considerable amount of income. But what are the principles on which you are to take the amount of income? You have had furnished to you the gross amount as to which no question at all is raised, except one to which I will draw your attention. He appears to have had a very lucrative practice, and to have received in some cases, very large fees. In one case the sum was 5000 guineas. If that had been sought to be taken into account in ascertaining the average income, it would have been open to objection, because such a thing might happen once in a man's life, and never happen again. Therefore, very reasonably, the accountants who have gone through the figures have agreed that that fee is not to be taken into account at all, and the way they have dealt with the case is this: They have taken from the attendance book the number of times when the patient was visited, or visited the doctor, and have put down a guinea for every attendance. I do not know whether you think there is any very great reason to complain of that. It is entirely a question for you. That I think is the only question as to the amount of income with which you are to start. Now how are you to deal with the loss of future income? I first of all say that I see nothing whatever in this case to lead you to give vindictive damages. I say also that you are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. You must take all things into consideration, and endeavour to see if you can what is the proper mode of dealing with them. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into account here, and I only give it by way of illustration of what must pass through your minds for the purpose of seeing what sum is to be given. It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

probable continuance of the plaintiff's professional income would have been.

"There is another matter which has been discussed a good deal, and it is one of considerable difficulty, viz. how far you are to take into account the plaintiff's position. In the case of a poor man, who lost his leg or arm, by which he earned his living, you would probably in considering what sum you would give him take into account that he was deprived of the power of earning a livelihood. On the other hand, my Brother Ballantine asks you to take into account that the plaintiff and his wife are in receipt of an income of something like 3500*l.* a-year, so that he will be above all want, and will be able to live comfortably and with all the reasonable enjoyments of life. I must confess for myself I have very great difficulty in seeing how you can say that because a person who is injured is very well off, therefore, the person who injures him is not to pay reasonable or proper compensation. The damages to which a man is entitled are the consequences of a wrongful act by which he suffers. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would have been likely to earn if this accident had not happened. That has been taken from him, and I am at a loss to see how the fact that he enjoys a considerable income from other sources, can alter the amount which you ought to give him. At the same time, as all the circumstances of the case are to be under your consideration, I cannot altogether remove that fact from your view, in the same way as I tell you that you must not give the value of an annuity for the whole of the plaintiff's life, and that the law does not assume that in cases of injury to persons an equivalent is of necessity to be given."

The jury gave the plaintiff 7000*l.* The plaintiff moved for a new trial, which was granted by the Queen's Bench Division, on the ground that the amount of damages given by the jury was so small as to shew that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed.

Ballantine, Serjt. and *Dugdale,* for the defendants. The Court

will not interfere with the verdict of a jury as to unliquidated damages where there is no certain basis of calculation, unless there has been misdirection, or the jury have miscalculated figures, or been guilty of misconduct: *Forsdike* v. *Stone*. (1) No misconduct is alleged. There was no miscalculation of figures, for there were elements of uncertainty in the income. A professional income is not like a certain annuity, and a jury is not bound to believe that it could not fall off. There was no misdirection; the judge could not exclude from the consideration of the jury the fact that the plaintiff and his wife had 3500*l*. a year from property, for the fact had been proved before them, but he tells them to pay no attention to it. He was correct in telling them that they were not bound to give full compensation, that rule being settled by *Rowley* v. *London and North Western Ry. Co.* (2)

[BRETT, L.J. Do you contend that if in a case of malignant slander very likely to cause heavy pecuniary loss the jury gave a farthing damages the Court could not interfere?]

If the jury had fairly considered the case the Court would not interfere: *Falvey* v. *Stamford* (3), *Kelly* v. *Sherlock* (4), and so in a case of personal injury: *Armytage* v. *Haley*. (5) The principle as to a judge not interfering with a verdict because he differs from it is clearly laid down by Brett, L.J., in *Bridges* v. *North London Ry. Co.* (6)

Sir J. Holker, *A.G.*, *Pope*, *Q.C.*, and *A. L. Smith*, for the plaintiff. The Queen's Bench Division rightly held that the damages were so grossly inadequate as to shew conclusively that the jury must have omitted to take into consideration some of the elements of damage. They have actually given the plaintiff nothing but bare compensation for the pecuniary loss which he has sustained up to the present time.

[THE COURT here stated that they did not require to hear the plaintiff's counsel on that point, and asked whether a decision on the question of misdirection was pressed for.]

The case will go to the House of Lords, and the plaintiff wishes for a decision on the question of misdirection. The accuracy of

(1) Law Rep. 3 C. P. 607.
(2) Law Rep. 8 Ex. 231.
(3) Law Rep. 10 Q. B. 54.
(4) Law Rep. 1 Q. B. 686.
(5) 4 Q. B. 917.
(6) Law Rep. 7 H. L. 213, 235.

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

the rule laid down by Brett, L.J., in *Rowley* v. *London and North Western Ry. Co.* (1) is disputed. It no doubt is the rule that a jury must not attempt to give a man a full compensation for bodily injury, if they were to do so there would be no limit to the amount of damages, for no sum would be an equivalent for the loss of a man's eyes; but full compensation is to be made for pecuniary loss.

[BRETT, L.J. What do you say would have been the correct direction to the jury in *Rowley's Case.* (1)]

That the jury must take into account the value of an annuity during the joint lives of the covenantor and covenantee, having regard to the mode in which it was secured and to all the circumstances of the covenantor.

[BRETT, L.J. That is not much more definite than the rule I laid down.]

It does give the jury a sufficient guide to the circumstances to be taken into consideration.

[JAMES, L.J. The proper direction to the jury, as it seems to me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth.

BRETT, L.J. Do you say that the conduct of the defendants is not to be taken into account?]

Certainly, it is not. If the defendants are in the wrong they must make compensation for the injury accruing from the wrong.

[JAMES, L.J. I think that what Field, J., meant to say was—so far as the injury results in actual pecuniary loss you must give the plaintiff full compensation for that loss, but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed upon the principle of making full compensation. Whether what he said would convey that idea to the jury may perhaps be questioned.]

Then the plaintiff complains that the judge did not tell the jury entirely to throw out of consideration the fact of the plaintiff having 3500*l.* a year from property.

[JAMES, L.J. Is it not admissible in this way? A man with

(1) Law Rep. 8 Ex. 231.

that amount of property would be more likely to retire from practice than a man who has nothing.]

That is not disputed, but there is nothing in the summing up to shew the jury that they ought not to give any other weight to the fact. What, however, the plaintiff mainly relies on is that the jury ought to have been distinctly told that, although as regards bodily injury, apart from pecuniary loss, they can go no further than to give what they think reasonable, without attempting to make full compensation, yet as to pecuniary loss, whatever difficulty there may be in ascertaining it, when it is ascertained the jury must give the full amount of it, without regard to the question whether it is of so large an amount as to make it extremely inconvenient to the defendants to pay it. The judge has mixed the two things together in such a way as to lead the jury to treat the whole matter according to the rule applicable only to bodily injury, and to consider that they were not to give full compensation for the pecuniary loss.

Ballantine, Serjt., in reply. The defendants never contended that the 3500*l.* a year should be taken into consideration as regards the plaintiff's pecuniary loss; but it is to be considered as regards the compensation for personal injury, since bodily suffering is more tolerable to a person who has the means of procuring every comfort.

JAMES, L.J. In this case we are of opinion that we cannot on any of the points differ from the judgment of the Queen's Bench Division.

The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which, generally speaking is considered to be within their exclusive province, that is to say, the amount of damages. We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a Court of first instance, and if necessary of a Court of Appeal in this way, that is to say, if in the judgment of the

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for reconsideration by another jury. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent of course we must not speculate, and have no business to say. We are, therefore, of opinion that the Queen's Bench Division was right in directing a new trial.

Then if our decision remains unreversed by the House of Lords, where we understand this matter is to go, and the case goes before another jury, it may be important to see whether the direction of Mr. Justice Field was right. The Queen's Bench Division came to the conclusion that they could see no misdirection in the summing up of Mr. Justice Field, and the counsel for the plaintiff did not say that there is anything upon which they can put their finger and say, "Here is a misdirection." They principally go upon the ground that there is in the summing up an uncertainty which would have the effect of misdirection, and that the attention of the jury was not sufficiently drawn to the distinction between damages for personal injuries apart from pecuniary loss and damages for pecuniary loss actually resulting from the injuries. They also complain that the fact that the plaintiff and his wife had an income of 3500*l.* a year was not absolutely withdrawn from the attention of the jury.

Now, on the first point, taking the whole of the summing up together, it seems to me that the case was put to the jury in the way in which the plaintiff's counsel contend that it ought to be put. Mr. Justice Field says, "An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into account here, and I only give it by way of illustration of what must pass through your minds for

the purpose of seeing what sum is to be given. It is given, recollect, once for all, and once only, you must not forget that, and it must be given on the fairest estimate you can make of what the probable continuance of the plaintiff's professional income would have been." That comes to this, you are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable. I do not know how otherwise the case could be put. Again he says: "The damages to which a man is entitled are the consequences of the wrongful act by which he suffers. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would have been likely to earn if this accident had not happened." The case could not have been put more favourably for the plaintiff than it was thus put by Mr. Justice Field.

Then as regards the 3500*l.* a year to which the plaintiff and his wife were entitled. The appellants' counsel say that it was not presented to the jury as bearing upon the amount of damages to be given for loss of professional income, but with reference to the damages for the want of enjoyment of life arising from bodily injury; and no doubt, as regards the personal injury, there are circumstances to which counsel may very legitimately call the attention of a jury as distinguishing a man with 3500*l.* a year from a poor man. If the fact that the plaintiff had 3500*l.* a year had been presented to the jury as a ground for diminishing the damages to be given for loss of income, what was said by Mr. Justice Field might have been capable of being understood in such a sense as would make it a misdirection, but as we understand, it was not so put to the jury. The judges of the Queen's Bench Division did not understand the ruling in that sense, nor do we feel it necessary so to understand it. When the matter goes down to another jury, whatever ambiguity there may have been in the summing-up will be set right, and it is not necessary for us to say that there was in this case such a direction as was likely to be misunderstood by the jury, or was likely to mislead them in the consideration of the case. Therefore the matter, so

1879

PHILLIPS v. LONDON AND SOUTH WESTERN RAILWAY CO.

far as we are concerned, will stand exactly as it was left by the Court of Queen's Bench.

BRETT and COTTON, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Hargrove & Co.*
Solicitor for defendants: *M. H. Hall.*

Nov. 6.

BUTTON *v.* THE WOOLWICH BUILDING SOCIETY.

Practice—County Court—Appeal by Motion—Judge in Chambers—Adjournment to Divisional Court—38 & 39 Vict. c. 50, s. 6.

Under 38 & 39 Vict. c. 50, s. 6,—which gives an appeal by motion from the decision of a county court, and enacts that where the Court to which such appeal lies is not then sitting, the motion may be made before a judge in chambers—the judge in chambers before whom such a motion is made cannot adjourn the further hearing of it to the next sitting of the Court to which the appeal lies, but must himself hear and determine it.

THIS was a plaint heard in the Greenwich county court on the 15th of October, 1879. The judge having non-suited the plaintiff application was made to Bowen, J., in chambers within eight days after the decision for a rule nisi for a new trial. The learned judge adjourned the application, which was renewed at a later day in the vacation before Lindley, J., who then adjourned it to the next sittings of the divisional court.

Nov. 6. *Atherley-Jones* moved accordingly.

FIELD, J. I think that under 38 & 39 Vict. c. 50, s. 6 (1), the judge in chambers has no power to adjourn the motion made before him into this Court. He is the person appointed by the section to hear and determine the matter, and we have no jurisdiction over it.

MANISTY, J., concurred.

Motion rejected.

Solicitor for plaintiff: *E. Kimber.*

(1) By 38 & 39 Vict. s. 50, s. 6, an appeal is given against the decision of a county court "by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance.—And if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers."

[IN THE COURT OF APPEAL.]

1879
Dec. 19.

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF THE PARISH OF LEWISHAM, RESPONDENTS; THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY, APPELLANTS.

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss*, 158, 159, 161—*Rate for defraying Expenses incurred in Execution of Act—Expenses not incurred for equal Benefit of Whole Parish—Form of Precept.*

By the Metropolis Management Act, 1855, s. 158, vestries and district boards are directed from time to time by order to require the overseers of the several parishes within their district to levy the sums, which such vestries or district boards may require for defraying the expenses of the execution of the Act, and by s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require. By s. 161 the overseers are to make equal pound rates.

A precept to overseers under the above sections for the levy of a rate stated that the expenses, in respect of which it was needed, were not required for the equal benefit of the parish, and directed the rate to be levied as regarded such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in proportion of one-fourth part only of the net annual value of such land. The classes of land mentioned in the precept did not lie together, or form any division marked out by metes or bounds, but were scattered through the parish:—

Held, that the precept was good.

Judgment of the Queen's Bench Division (4 Q. B. D. 389) affirmed.

Fowell v. *London Dock Co.* (8 E. & B. 212; 27 L. J. (M.C.) 177) commented upon.

4 Jur. N.S. 205

APPEAL of the defendants by leave against an order of Cockburn, C.J., and Lopes, J., confirming an order of sessions made upon an appeal against a rate under the Metropolis Management Act, 1855.

The facts and the sections of the statute are fully set out in the report of the proceedings before the Queen's Bench Division. (1)

(1) 4 Q. B. D. 389.

1879

THE QUEEN v. LONDON AND BRIGHTON RAILWAY CO.

The only question relied on by the defendants' counsel before the Court of Appeal was that the precept, under which the rate appealed against was levied, was bad, "inasmuch as the district board have no power under the 159th section of the Metropolis Management Act, 1855, or otherwise, to order the rate to be levied in the manner directed by the precept, and can only exempt or order a less rate to be levied upon any particular part of a parish described and marked out by metes and bounds." It is here necessary to state only the following facts:—

By a precept under the common seal of the Board of Works for the Lewisham district, the prosecutors were required to levy within their parish "the sum of 11,524*l.* for the purpose of defraying the expenses already or hereafter to be incurred by the said board in the execution of" the Metropolis Management Act, 1855, "and it appearing to the said board that the expenses, in respect of which the said sum of 11,524*l.* is required, are not for the equal benefit of the said parish, the said board do further order and require that the rate or rates to be raised in pursuance of this present precept shall, as regards all such parts of the parish as consist of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery grounds, be assessed and levied in the proportion of one-fourth part only of the net annual value of such land." The rate appealed against was made in accordance with the terms of the precept. About 3000 acres of land in the parish of Lewisham fell under the classes mentioned in the precept: the 3000 acres did not lie together, but were scattered through the parish.

Joseph Brown, *Q.C.*, and *Oppenheim*, for the defendants. This precept is bad, and vitiates the rate made in pursuance of it. Under the Metropolis Management Act, 1855, a discretion is vested in the vestry or district board to decide what parts of a parish are to be rated at a lower rate, and in order to determine this the metes and bounds of those parts ought to be set out. The form of precept used in the present case shifts the exercise of the discretion from the vestry or district board to the overseers or guardians of the poor of the parish to be rated.

[BRETT, L.J. Suppose that a piece of woodland is called by

1879

THE QUEEN v. LONDON AND BRIGHTON RAILWAY CO.

one well-known name, and that a field also is called by another? Would it not be sufficient if the precept described them respectively by those names?]

It must be admitted that such a description would be sufficient. The prosecutors may rely upon *Howell* v. *London Dock Co.* (1), but no principle was really decided in that case: *Reg.* v. *Great Western Ry. Co.* (2)

[BRAMWELL, L.J. I do not think that *Howell* v. *London Dock Co.* (1) has much bearing upon the present case.]

Meadows White, Q.C., and *Douglas Kingsford*, for the prosecutors. The Metropolis Management Act, 1855, s. 159, does not specify what sort of property is to be exempt: that no doubt is to be determined by the vestry or district board; but they may signify their determination by describing in general terms the property to be exempted. If the argument for the defendants were correct, it would be necessary to specify in the precept every field and orchard in the parish.

[They were then stopped.]

BRAMWELL, L.J. We need not call upon the prosecutors' counsel for any further argument.

I think that the judgment of the Queen's Bench Division was right and must be affirmed. The objection taken is that the land to be partially exempted is not specified in the precept otherwise than by describing its use; that is to say, no field, or plot, or space is particularly described, but a general description of the parts to be exempted is given. I cannot say that the Board of Works were under any obligation to give such a description as is suggested, and I think that the property to be partially exempted is sufficiently specified by mentioning the use to which it is put. A certain advantage is attendant upon this mode of description with reference to the condition of the land at the time when the rate is actually made; because, if at that time the land by any possibility should have become so changed in its condition that either it was or, what is much more probable, was not entitled to exemption, the land ought to be rated accordingly, although at

(1) 8 E. & B. 212; 27 L. J. (M.C.) 177.

(2) E. B. & E. 600, at p. 613 n.; 28 L. J. (M.C.) 59, at p. 64.

1879

THE QUEEN v. LONDON AND BRIGHTON RAILWAY CO.

the time when the precept was issued it was not in that condition. The counsel for the prosecutors has given an answer to the doubts which I have felt; but I wish to add this remark: at least primâ facie, it is not for the defendants to complain if the owner of any land finds himself subject to the rate for the higher amount, because the land has changed its condition and falls within that amount, although at the time when the precept was issued it fell within the lower amount: even if the owner of the land has a right of appeal, yet I do not see that the defendants have any reasonable ground of complaint.

BRETT, L.J. Only one objection to the rate made by the prosecutors has been argued before us, and that objection is that the precept of the Lewisham Board of Works, upon which it is founded, is bad in point of law. Upon referring to the precept itself it will be found that by its very language it deals with "parts of the said parish;" but it has been argued for the defendants that the precept has not dealt properly with the "parts," because it has not defined them by metes and bounds. It is admitted that the precept may lawfully require lands of the specified descriptions to be dealt with at a lower rate, and the question is reduced to this, whether it is necessary to define them by metes and bounds. The precept is issued under the powers given by the Metropolis Management Act, 1855, s. 159, which provides that a vestry or district board shall have a discretion for lessening the amount of rate, so far as it is levied upon parts of the parish which do not derive equal benefit from the proposed expenditure, and, in fact, parts of the parish or district may be exempted altogether. The 159th section does not expressly direct that the lands to be partially or wholly exempted must be specifically described or defined, or that they must be ascertained by metes and bounds. It is only necessary to give a direction that certain parts shall be exempted "as the circumstances of the case may require." Upon referring to the precept, it cannot be denied that all the kinds of land therein described are "parts" of the parish upon which a lower rate is to be assessed, and that the overseers can ascertain what lands fall within the description. During the argument some instances of sufficiency of description

were suggested by the Court to the counsel for the defendants, and they admitted that in them the description would be sufficient; yet in not one of these instances was the description by metes and bounds. This was an admission fatal to the point for which they were contending, and for this reason alone it is very clear to me that the judgment of the Queen's Bench Division was right.

Reference has been made to *Howell* v. *London Dock Co.* (1), and I am inclined to agree with Erle, C.J., in what he said as to that case in *Reg.* v. *Great Western Ry. Co.* (2), namely, that no principle was decided in it. In that case it seems to me that by the consent of the parties the Court was asked to do that which the Court of Queen's Bench in my experience almost invariably refused to do: the Court was asked to deal with the facts. In rating cases the practice of the Court of Queen's Bench was to require the facts to be stated and found in the case: but in *Howell* v. *London Dock Co.* (1) they consented to give their opinion as to the facts. I am therefore inclined to think that it cannot be cited as an authority. But even if it is to be deemed an authority, it has no bearing upon the point argued before us, although it might have some reference to the questions raised before the Queen's Bench Division. We do not now question or overrule *Howell* v. *London Dock Co.* (1), we only say that it is not applicable to the case as it has been presented to us.

COTTON, L.J. In this case an objection has been taken to the precept issued by the district board, and directing a certain sum to be raised in the parish of Lewisham. Acting under the powers of the Metropolis Management Act, 1855, s. 159, the district board came to the conclusion that the expenditure which the rate was intended to meet would not be of equal benefit to the whole of the parish; they therefore directed by their order or precept that certain parts of the parish should be rated at a lower amount, that is to say, they directed that such parts of the land in the parish as were used for certain specified purposes should be assessed in the proportion of one-fourth part only of their net annual value. The question really is whether that description is

(1) 8 E. & B. 212; 27 L. J. (M.C.) 177.

(2) E. B. & E. 600, at p. 613; 28 L. J. (M.C.) 59, at p. 64.

1879

THE QUEEN v. LONDON AND BRIGHTON RAILWAY CO.

sufficient. It is stated in the case that about 3000 acres in the parish of Lewisham are used and occupied in the manner mentioned in the precept; but that they are not contiguous to one another, and are scattered through the parish. It is in effect conceded that the precept would have been good, if it had properly defined those 3000 acres; but it has been argued as an objection to the precept that each piece of land used for the purposes mentioned ought to have been described and marked out by metes and bounds, because by the precept in its present form it is left to the overseers or guardians to exercise that discretion which ought to have been exercised by the district board. The objection would have been valid, if the discretion conferred by the legislature upon the district board had been left to be exercised by the overseers or guardians; but that is not so. The district board have exercised their discretion by pointing out what parts of the parish shall be rated at the lower amount, and they have merely left to the overseers or guardians the duty of ascertaining to what parts of the parish the description given in the precept refers, it being a convenient method of defining the parts of the parish to be partially exempted to mention the use to which they are put: the district board have simply left to the overseers or guardians the duty of going round the parish, and of finding out what parts are to be assessed at the lower amount by observing what parts are used for the purposes mentioned in the precept. Id certum est quod certum reddi potest. In my opinion the precept contains a sufficient description of the parts of the parish, which are to be rated on a lower scale. I therefore think that the precept is valid, that the only objection taken in this Court to the rate founded upon that precept cannot be sustained, and that the order of the Queen's Bench Division must be affirmed.

Appeal dismissed.

Solicitor for prosecutors: *Samuel Edwards, Lewisham.*
Solicitors for defendants: *Norton, Rose, Norton, & Brewer.*

[IN THE COURT OF APPEAL.]

1879
Dec. 19.

THE QUEEN ON THE PROSECUTION OF H. E. CRISP *v.* PEMBERTON AND ANOTHER.

THE QUEEN ON THE PROSECUTION OF H. E. CRISP *v.* SMITH AND ANOTHER.

Practice—Appeal from Inferior Court—No Leave to appeal from Order of High Court—Rule for Certiorari—Supreme Court of Judicature Act, 1873, *ss.* 19, 45—*Poor Law—Removal of Pauper Lunatic to Asylum—Order by Officiating Clergyman*—6 *&* 7 *Vict. c.* 101, *s.* 56—*Lunatic Asylums Act*, 1853 (16 *&* 17 *Vict. c.* 97), *s.* 67.

M., the wife of H., resided in the parish of G. Whilst H. was absent, M. was taken thence as a destitute person to the workhouse of C. Union, situate in the parish of C. After she had been an inmate for ten days, the medical officer of the union certified that she was of unsound mind, and thereupon a relieving officer of the union and the curate of the parish of C. ordered that she should be removed to an asylum. An order was afterwards made by two justices upon H. for the maintenance of M. Rules for certiorari were obtained by H. in the Queen's Bench Division for the purpose of removing the two orders into that court; but the rules were afterwards discharged. No leave to appeal was given by the Queen's Bench Division:—

Held, that the Court of Appeal had jurisdiction to hear an appeal, notwithstanding the Supreme Court of Judicature Act, 1873, s. 45:

But, *held*, that the curate of the parish of C. was the officiating clergyman of the parish in which M. was residing within the meaning of 16 & 17 Vict. c. 97, s. 67; and that 7 & 8 Vict. c. 101, s. 56, did not apply.

THE following facts were stated in the affidavits sworn upon behalf of the prosecutor and the defendants.

The prosecutor had a house situate in the parish of Granchester, in the county of Cambridge. In the month of June, 1878, he went from Granchester to Sheffield to enter upon an engagement as clerk, leaving his wife, Mary Ann Crisp, at Granchester. G. Smith was one of the relieving officers of the Chesterton Union in that county, and at the latter end of October, 1878, received information leading him to believe that M. A. Crisp was destitute. Accordingly he visited her at Granchester, and upon the 2nd of November took her, with her consent, to the workhouse of the Chesterton Union, to which the parish of Granchester belonged. She became an inmate, but she shewed symptoms of unsoundness of mind; and on the 12th of November, P. J. Moloney, the

1879

THE QUEEN v. PEMBERTON.

THE QUEEN v. SMITH.

medical officer of the Union, certified that she was of unsound mind, and acting upon this certificate, G. Smith and G. Hale ordered, under their hands, that M. A. Crisp should be received into the pauper lunatic asylum at Fulbourne, and on the 13th of November she was, in pursuance of that order, removed from the workhouse. At the time of giving the order, G. Hale was the curate of the parish of Chesterton, in which the workhouse was situate; the vicar, who was the chaplain of the workhouse, was temporarily absent, and during his absence G. Hale officiated for him in all matters connected with the parish. Upon the information of C. W. Palmer, assistant clerk of the Chesterton Union, an order was afterwards made by H. W. Pemberton and J. H. Wilkinson, two justices of the peace for the county of Cambridge, whereby the prosecutor, H. E. Crisp was adjudged to pay the sum of 10*s.* 9½*d.* per week towards the cost of the maintenance of M. A. Crisp, his wife, a pauper lunatic confined in the pauper lunatic asylum at Fulbourne.

At the instance of H. E. Crisp a rule was obtained in the Queen's Bench Division calling upon H. W. Pemberton and J. H. Wilkinson to shew cause, why a writ of certiorari should not issue to remove into that division the order for maintenance of M. A. Crisp. One of the grounds upon which the rule was obtained was stated to be that M. A. Crisp was not lawfully removed to the asylum as a pauper, inasmuch as the Rev. G. Hale was not an officiating clergyman within the true intent and meaning of the 67th section of 16 & 17 Vict. c. 97. A similar rule for a certiorari was obtained also against G. Smith and G. Hale for the removal into the Queen's Bench Division of the order made by them on the 12th of November, 1878, for the reception of M. A. Crisp into the pauper lunatic asylum at Fulbourne.

These rules were after argument discharged. No leave to appeal was given by the Queen's Bench Division.

The prosecutor appealed.

Lumley Smith (*Cockerell*, with him), for the defendants. There is a preliminary objection to the hearing of these appeals. The proceedings are in form rules for certiorari, but the prosecutor is really appealing from an order of justices made in petty sessions.

Now a court of petty sessions is an inferior Court within the Supreme Court of Judicature Act, 1873, s. 45 (1), and without leave there can be no appeal from the decision of the High Court. Here no leave to appeal has been obtained from the Queen's Bench Division. This cannot be considered as an appeal from an order of the High Court under the Supreme Court of Judicature Act, 1873, s. 19. The counsel for the prosecutor may rely upon *Overseers of the Poor of Walsall* v. *London and North Western Ry. Co.* (2): but it is clearly distinguishable, for in that case leave to appeal was given.

Gully, Q.C. (*W. Graham* and *John Wm. Cooper*, with him), for the prosecutor, was not called upon to argue as to the preliminary objection.

BRAMWELL, L.J. We all think that we have jurisdiction to hear this appeal.

BRETT, L.J. Speaking for myself only, I wish to point out that this is not an appeal from a judgment of the Queen's Bench Division upon a writ of certiorari, but upon rules to shew cause why writs of certiorari should not issue to bring up certain orders. I do not express any opinion whether an appeal from the judgment

(1) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 19, "the said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of her Majesty's High Court of Justice, or of any judges or judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act."

Section 45: "All appeals from petty or quarter sessions, from a county court, or from any other inferior Court, which might before the passing of this Act have been brought to any court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by Divisional Courts of the said High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose, pursuant to rules of Court, or (subject to rules of Court) as may be so assigned according to arrangements made for the purpose by the judges of the said High Court. The determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard."

(2) 4 App. Cas. 30.

1879

THE QUEEN v. PEMBERTON.

THE QUEEN v. SMITH.

of the Queen's Bench Division will lie without leave, after orders have been removed by writs of certiorari into that Court from petty sessions. In the present case, however, I quite agree with the other Lords Justices that an appeal lies to this Court.

COTTON, L.J., concurred.

The appeal was then heard upon the merits.

Gully, Q.C., and *W. Graham* (*John Wm. Cooper*, with them), for the prosecutor. Perhaps a certiorari will not lie to bring before the Queen's Bench Division the order for removal to the asylum, for it may be considered not to be the record of a judicial act; and on that ground it is possible to argue that the rule to remove that order was rightfully discharged. But it is very clear that the order of the justices for the maintenance of M. A. Crisp ought to have been removed into the Queen's Bench Division and there quashed. It was intended to be made in pursuance of 13 & 14 Vict. c. 101, s. 5 (1), but it cannot be supported, inasmuch as M. A. Crisp had

(1) By 7 & 8 Vict. c. 101, s. 56: "For the purposes of relief, settlement, and removal of poor persons, and the burial of the poor, the workhouse of any union or parish, ... shall be considered as situated in the parish to which each poor person respectively to be relieved, removed, or buried, or otherwise concerned in any such purpose, is or has been chargeable."

By 13 & 14 Vict. c. 101, s. 5: "Where any married woman being lunatic shall be duly removed to any asylum, licensed house, or registered hospital, under any of the statutes in such behalf, any two justices having jurisdiction in the place wherein the husband of such lunatic shall dwell, upon application by or on behalf of the guardians of the union or of the parish having a separate board of guardians, or the overseers of the parish, to which union or parish respectively such lunatic shall be or become chargeable, may summon such husband to appear before them to shew cause why an order should not be made upon him to maintain or contribute towards the maintenance of his wife in such asylum, licensed house, or registered hospital; and upon his appearance, or in the event of his not appearing upon proof of due service of such summons upon him, such justices may (if they think fit) make an order upon him to pay such sum, weekly or otherwise, for or towards the cost of the maintenance of such lunatic, as after consideration of all the circumstances of the case shall appear to them to be proper, and determine in such order how and to whom the payments shall from time to time be made, which order shall, if the payments required by it to be made be in arrear, be enforced in the manner prescribed by the statute passed in the twelfth year of the reign of her Majesty, intituled, &c., for the enforcing of orders of justices requiring the payment of a sum of money."

The Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), s. 67, contains provi-

not been "duly removed" to the asylum. The order for removal from the workhouse was signed by G. Smith and G. Hale, and it was probably intended to put in force the provisions of 16 & 17 Vict. c. 97, s. 67; the order, however, is invalid, for although G. Smith was properly qualified as a relieving officer, yet G. Hale was not the officiating clergyman of the parish in which M. A. Crisp was resident. The legal residence of M. A. Crisp, whilst she remained in the workhouse, was determined by 7 & 8 Vict. c. 101, s. 56, which amongst other provisions enacts that for the purposes of "relief" and "removal," the workhouse shall be considered as situated in the parish, to which the pauper is chargeable. The parish where M. A. Crisp resided before her admission to the workhouse was Granchester; G. Hale was not the officiating clergyman of that parish: he was merely the curate of the parish of Chesterton, in which the workhouse was locally

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sions empowering a justice to order a pauper lunatic to be conveyed to and detained in an asylum: "provided also, that in case any pauper deemed to be a lunatic cannot, on account of his health or other cause, be conveniently taken before any justice, such pauper may be examined at his own abode or elsewhere by an officiating clergyman of the parish in which he is resident, together with a relieving officer, or if there be no relieving officer an overseer of such parish, and such officiating clergyman, together with such relieving officer or overseer, shall call to their assistance a physician, surgeon, or apothecary; and if such physician, surgeon, or apothecary shall sign a certificate with respect to such pauper according to the said form in the said schedule (F) No. 3, and if upon view or examination of such pauper such officiating clergyman and such relieving officer or overseer be satisfied that such pauper is a lunatic and a proper person to be taken charge of and detained under care and treatment, such officiating clergyman, together with such overseer or relieving officer, shall, by an order under their hands according to the said form in the said schedule (F) No. 1 direct such pauper to be received into such asylum as hereinafter mentioned, or where hereinafter authorized in this behalf, into some such registered hospital or licensed house as aforesaid, and such relieving officer or overseer shall immediately convey or cause such pauper to be conveyed to such asylum, hospital, or house, and such pauper shall be received and detained therein."

By the interpretation clause (s. 132) of 16 & 17 Vict. c. 97: "'Lunatic' shall mean and include every person of unsound mind, and every person being an idiot; 'pauper' shall mean every person maintained wholly or in part by or chargeable to any parish, union, or county: . . . . 'officiating clergyman of the parish,' shall include the chaplain of the workhouse of the same parish, or of the workhouse of a union to which such parish belongs."

1879]

THE QUEEN v. PEMBERTON.

THE QUEEN v. SMITH.

situate; he was not even the chaplain of the workhouse, who, under the interpretation clause (s. 132) of 16 & 17 Vict. c. 97, might have lawfully signed the order of removal. The object of sending M. A. Crisp to the asylum was that she might receive "relief," and she was accordingly "removed" from the workhouse; but the order for removal ought to have been signed, in the absence of a justice of the peace, by the officiating clergyman of Granchester, or at least by the chaplain of the workhouse; as this was not done, the order for removal was bad, and the order for maintenance which depended upon it cannot be supported. The Queen's Bench Division ought to have made the rule absolute to bring up the order of maintenance for the purpose of quashing it.

Lumley Smith and *Cockerell*, for the defendants, were not called upon to argue.

BRAMWELL, L.J. It is clear to my mind that in order to carry out the intention of 16 & 17 Vict. c. 97, s. 67, the actual abode of a lunatic pauper must be looked at. The object of 7 & 8 Vict. c. 101, s. 56, is that where it is necessary to ascertain the residence of a pauper for the purposes specified therein, regard must be had to the parish from which he has been taken; but here the question is where the pauper was actually abiding at the time when she was ordered to be removed to the asylum, and it is clear that her place of abode was then the workhouse; and that is situate in the parish of which the Rev. G. Hale was curate. The statute 7 & 8 Vict. c. 101, s. 56, is not to be read as applying to this case. The Queen's Bench Division came to a right conclusion in discharging these rules, and their decision must be affirmed.

BRETT, L.J. The question before us is, in what parish M. A. Crisp was dwelling when she was ordered to be removed to the asylum. The order for removal is to be signed by the officiating clergyman of the parish, in which the pauper has been residing. At the time when the order for the removal of M. A. Crisp was made, she was abiding in the workhouse, and also was residing in the parish of Chesterton. The Rev. G. Hale was the curate of that parish, and in the absence of the vicar was the officiating

clergyman of it; he was therefore the proper person to sign the order for removal to the asylum. The statute relied upon by the prosecutor, 7 & 8 Vict. c. 101, s. 56, does not apply; the intention of the legislature in passing it was that by residing in the workhouse a pauper shall not lose the right to his settlement, and that the parish where he is settled shall be chargeable with the cost of burying him and with similar expenses. This statute has no effect upon the construction of 16 & 17 Vict. c. 97, s. 67.

COTTON, L J. The question is whether the order for removal to the asylum was properly made. The order could be lawfully signed by the officiating clergyman of the parish, in which M. A. Crisp resided. She was then residing in the workhouse, which is situate in the parish of Chesterton, and the Rev. G. Hale, who signed the order, was the curate of that parish. Primâ facie, therefore, he was the proper person to sign the order. It has been argued, however, that M. A. Crisp is not to be deemed to have been residing in the parish of Chesterton but in the parish of Granchester, and reliance has been placed upon 7 & 8 Vict. c. 101, s. 56. But the removal mentioned in that statute does not include the removal of a lunatic to an asylum, and we ought not to read that statute as interpreting 16 & 17 Vict. c. 97, s. 67: if we were to construe 16 & 17 Vict. c. 97, s. 67, by the aid of the earlier enactment, we should give it an artificial and technical meaning which ought not to be adopted. I therefore think that the order for removal to an asylum has been properly made.

Appeals dismissed.

Solicitor for prosecutor: *Richard Davies, for Joseph Smith, Wednesbury.*

Solicitors for defendants: *Montagu, Scott, & Baker, for Barlow, Palmer, & Bonnett, Cambridge.*

1879
Jan. 12.

IRVINE & CO. *v.* WATSON & SONS.

Principal and Agent—Contract—Sale of Goods—Undisclosed Principal—Payment to Agent when a discharge of Principal.

There is a distinction between cases where an agent in effecting a contract for the purchase of goods does not disclose the existence of a principal at all and cases where he discloses that he has a principal but does not give his name. Whereas in the former class of cases it is settled law that the seller, upon discovery of the principal, cannot have recourse to him if in the meanwhile the principal has bonâ fide paid the agent:—

Held, by Bowen, J., on further consideration, that in the latter class of cases the seller may have recourse to the principal though he has bonâ fide paid the agent for the goods, unless there have been such conduct on the seller's part, e.g. delay in applying to the principal, as might justify the principal in concluding that the seller was not looking to his credit but to that of the agent.

THIS was an action for the price of eleven casks of palm oil, tried before Bowen, J., and reserved by him for further consideration. The facts sufficiently appear from the judgment. The case was argued on further consideration by

Herschell, Q.C., and *Kennedy*, for the plaintiffs.

Gully, Q.C., and *Crompton*, for the defendants.

The following authorities in addition to those referred to in the judgment were cited: *Higgins* v. *Senior* (1); *Smyth* v. *Anderson*. (2)

Jan. 12. BOWEN, J. The plaintiffs in this case are merchants carrying on business in Liverpool. The defendants are merchants at Leeds. The action is brought to recover from the defendants the price of eleven casks of Old Calabar palm oil. It is not denied that the defendants have had the oil, but the defendants resist the claim on the ground that the plaintiffs sold it, not to the defendants, but to Messrs. Conning & Co., from whom the defendants purchased it, and the defendants also maintain that, even supposing Conning & Co. to have been agents and brokers of the defendants and to have effected the purchase as brokers and agents, the plaintiffs nevertheless are precluded from suing the

(1) 8 M. & W. 834. (2) 7 C. B. 21; 18 L. J. (C.P.) 109.

defendants as undisclosed principals for the price, the defendants having in the meantime, and before any claim was made, paid Conning & Co. for the goods in acceptances discounted at once by Conning & Co. The case was heard before a special jury and myself at Liverpool, when after the examination of Mr. Irvine, one of the plaintiffs' firm, the jury was by consent discharged and the case was reserved for further consideration before myself, liberty being reserved to the Court to draw reasonable inferences of fact. The material facts of the case are as follows:—On the 10th of March, 1879, the defendants gave to Conning & Co. the order for the oil in question in a letter of that date of which the following is the material extract:—"To Messrs. John Conning & Co. March 10th, 1879. We noticed last week that palm oil was very low. If you can buy Old Calabar at about 31*l.* to 31*l.* 5*s.* you may secure us about a score casks, including them in the same draft as the tallow. Yours truly, Jos. Watson & Sons." On the 12th of March, two days after this letter, the manager of John Conning & Co. went to Mr. James Irvine, one of the plaintiffs' firm and purchased eleven casks. He told Mr. Irvine that he wanted the casks for a principal in the country, but nothing further was said about such principal. A contract was thereupon made and reduced into writing as follows:—"Messrs. John Conning & Co. We have this day sold to you the following goods. [Then followed enumeration of the goods and price.] Customary allowances and public sale conditions. Payment cash (or before delivery, if required), allowing 2½ per cent. discount. pp. James Irvine & Co., W. Geikie." The public sale conditions referred to in this document are the public sale conditions of January, 1871, of the Liverpool general brokers, the 3rd and 6th of which are as follows: "3. Brokers purchasing shall be responsible as principals unless they declare the name of the principals, such name being deemed satisfactory by the selling broker, not later than 4 o'clock on the day of the sale, or at the time of sale if after that hour. 6. Payments to be made as at present customary and, if required, upon delivery. The delivery of part shall not be considered delivery of the whole."

Having effected the contract Messrs. Conning & Co. wrote to the defendants on the 12th of March as follows: "We have

1879

IRVINE v. WATSON.

succeeded in getting you about ten tons fine Old Calabar oil at 31*l.* 5*s.*, and are forwarding all in accordance with your instructions." It appears not to be infrequent in the oil trade to require payment of a portion of the price before delivery. But it is not invariable, and in the present case no such demand was made. It is also not infrequent after delivery to allow three or four days grace before insisting on payment, but this is not a matter of universal practice or of right but of courtesy, depending in each case upon the will of the parties. Delivery of eight of the casks was given by the plaintiffs to Conning & Co. on the 13th of March, and of the three remaining casks on the 15th. Exclusive of the question of the days of grace the price of the eight of the casks became payable on the 13th, and of the remainder on the 15th of March. Upon the 15th of March the defendants paid Conning & Co. for the oil by their acceptances which were received on the 17th and discounted on the same day. On or about the same day an invoice, misheaded the 12th of March, was forwarded by Conning & Co. to the defendants, a copy of which is as follows :— "Liverpool, 12th March, 1879. Contract. Messrs. Josh. Watson & Sons, bought per John Conning & Co. Payment cash, less 2½ per cent. Eleven casks of palm oil." [Then followed particulars of the casks and price.] No application was made by the plaintiffs to any one for payment until about the 17th or 18th of March. On or about the 17th or 18th of March the plaintiffs applied personally to Conning & Co. for payment. Written applications for payment not unaccompanied in the end with threats were subsequently made by the plaintiffs to Conning & Co. on the 21st March, and between that date and the 25th. On the 27th of March, Conning & Co. stopped payment, and on the 28th of March, 1879, application was for the first time made by the plaintiffs to the defendants in a letter of that date. The defendants replied that they had paid Conning & Co. for the oil, and repudiated all liability to the plaintiffs, whereupon this action was brought. Whether Messrs. Conning & Co were the agents of the defendants to make the contract which they made, or to bind the defendants thereby is a question of fact. I think they had the defendants' authority to do so. The letter of the 10th of March appears to me to be an order to buy for and on behalf of the defendants in

the way in which a broker may properly be requested to buy, viz., in his own name, but still as a broker and for a principal behind. This is exactly what Conning & Co. did, and I think that they had authority to and did bind the defendants by that contract, the terms of which were cash, less 2½ per cent. discount, or before delivery, if required. The next question is whether anything has happened to exonerate the defendants from liability under this contract.

There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish. 1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law allows the seller to have recourse on such discovery to the undisclosed principal, provided always (see per Lord Tenterden, C.J., and Bayley, J., in *Thompson* v. *Davenport* (1)), that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, i.e., inequitable that the seller should any longer look to the principal for payment. This statement of the proviso which relieves the undisclosed principal in certain cases from all necessity to pay the seller, was thought by Parke, B., and the other judges in *Heald* v. *Kenworthy* (2), to be too large without further explanation, and they expressed the view that the only case, in which the seller under such circumstances was precluded from having recourse to the undisclosed principal when discovered, was when the seller by some conduct of his own had misled the principal into paying or settling with his agent in the interim. The principal, such is the reasoning of the Court of Exchequer, has originally authorized his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself by his conduct from enforcing it against him. The Court of Queen's Bench in *Armstrong* v. *Stokes* (3), do not adopt this narrower version of Lord Tenterden's, and Mr. Justice Bayley's proviso. They revert to the wider language used by Lord Tenterden, C.J., and Bayley, J., in *Thompson* v. *Davenport* (1), and it must now be taken to be the

(1) 9 B. & C. 78.

(2) 10 Exch. 745; 24 L. J. (Ex.) 170

(3) Law Rep. 7 Q. B. 599.

1879

IRVINE v. WATSON.

law that a seller who has given credit to an agent believing him to be a principal cannot have recourse against the undisclosed principal, if the principal has bonâ fide paid the agent at a time when the seller still gave credit to the agent, and knew of no one else except him as principal. 2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods the seller was informed that the person who came to buy was buying for a principal, but was not told and did not ask who that principal was, nor anything further about him. *Thompson* v. *Davenport* (1) is the leading authority to shew that, in such a case where no payment or settlement in account between the undisclosed principal and his agent has intervened, the seller may afterwards have recourse to the undisclosed principal. But what if the undisclosed principal has meanwhile innocently paid or settled with his agent? If indeed such payment or settlement is the result of any misleading conduct on the part of the seller, then no doubt the general principles alluded to in *Heald* v. *Kenworthy* (2) would equally apply, and the seller could no longer pursue his remedy against the man whom he had misled. But is this the only proviso, or must a wider proviso still in the present class of cases be engrafted on the statement of the rule similar to the proviso as finally sanctioned in *Armstrong* v. *Stokes* (3)? The case of *Armstrong* v. *Stokes* (3) was a case in which at the time of the sale exclusive credit had been given by the seller to the agent who bought in his own name as principal. In the present instance the agent bought, it is true, in his own name, but held out to the seller the additional advantage of the credit of an unnamed principal behind. What difference to the liability of the principal does this make? It is obvious that when, as in *Armstrong* v. *Stokes* (3), the seller deals exclusively with the agent as principal, the seller sells knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming as the fact is that the seller deals simply with the agent. The principal may be expected to arrange with his agent on this basis. If before recourse is had to him the undisclosed principal has put his agent in funds to pay, the seller cannot

(1) 9 B. & C. 78. (2) 10 Ex. 739; 24 L. J. (Ex.) 76.
(3) Law Rep. 7 Q. B. 599.

afterwards object that the undisclosed principal who had a right to suppose his credit was not looked to in the matter should have held his hand. The case is altered where the agent when buying states that he has a principal whose existence, though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller must depend in each case on what passes between the seller and the agent acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made. In the present instance the plaintiffs were informed that Conning & Co. bought as agents, and that they had an undisclosed principal in the transaction. The plaintiffs sold, trusting partly, but not wholly to the credit of the agent, for in fact they relied on the credit of an unknown and unnamed principal to the disclosure of whose name they were entitled on demand. The contract was for cash; the price was if not received before delivery to be payable forthwith upon delivery. The essence of such a transaction is that the seller as an ultimate resource looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment the seller does not want to have recourse to this additional credit. It remains in the back-ground: but if, before the time comes for payment or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit. It surely must, at all events, be the law that in the case of sale of goods to a broker the principal known or unknown cannot, by paying or settling before the time of payment comes with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, such a delay for example as leads to the inference that the debt is paid by the agent, or to the inference that though the

1879

IRVINE v. WATSON.

debt is not paid the seller elects to abandon his recourse to the principal and to look to the agent alone. Here the defendants parted with the acceptance on the 15th, it was discounted on the 17th. The plaintiffs had only given delivery on the 13th of eight of the casks, and of three upon the 15th. It does not appear to me, without laying any stress on the question of the days of grace, that the defendants on the 17th of March had any reason at all to believe that the sellers of the goods, whoever they might be, had no longer any claim upon any one except the broker. The fact is the defendants trusted their own broker. They made a mistake and must pay for it. The language of Lord Ellenborough in *Kymer* v. *Suwercropp* (1) is consistent with this view of the law, and it is one which has since been adopted in *Heald* v. *Kenworthy*. (2) Up to the 17th of March I see nothing accordingly which relieves the defendants from responsibility. Did the delay beyond that date and the failure of the brokers do so? If there was any reason to believe that in consequence of the delay the defendants' position towards their agents had been injuriously affected, then the defendants would to that extent be discharged. But I see no evidence that it was so. The defendants accordingly in my judgment remain liable for the price of the goods, and judgment must be given for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson.*
Solicitors for defendants: *Clarke & Son, for Dunning & Kay.*

(1) 1 Camp. 109.

(2) 10 Exch. 739; 24 L. J. (Ex.) 76.

WHALEY BRIDGE CALICO PRINTING COMPANY *v.* GREEN AND SMITH.

1879
Jan. 12.

Company—Promoter—Fiduciary Relation—Secret Profit made by Promoter—Right of Company to enforce Agreement made in favour of Promoter.

G. had purchased certain calico printing works for the sum of 15,000*l.* G. and S. associated themselves together as promoters of a company formed for the purchase of the works from G., and for the purposes of the negotiations for such purchase a contract, which the jury found to be a sham contract, was entered into between them for the pretended sale of the works by G. to S. for 20,000*l.* The company was ultimately formed, its directors being nominees of G. and S., and the works were conveyed by G. and S. to the company for 20,000*l.* It was agreed between G. and S. that G. should pay the sum of 3000*l.* out of the purchase-money to S., but this agreement was not communicated to the directors of the company when the sale to the company was effected:—

Held, by Bowen, J., on further consideration, that S., as a promoter of the company, was not entitled to secure any profit to himself out of the formation of the company without the knowledge of the directors, and that such being the case the company were entitled to treat the agreement made between G. and S. as made by S. on their behalf, and to enforce it against G., and that consequently they could recover from G. so much of the 3000*l.* which he had agreed to pay to S. as remained unpaid.

THIS was a case reserved for further consideration by Bowen, J. The facts and arguments sufficiently appear from the judgment. The case was argued on further consideration by

Russell, Q.C., *Herschell, Q.C.*, and *French*, for the plaintiffs.

Ambrose, Q.C., and *Gouldthorp*, for the defendants.

The following authorities were referred to: *MacKay's Case* (1); *Bagnall* v. *Carlton* (2); *Phosphate Sewage Company* v. *Hartmont* (3); *Craig* v. *Phillips* (4); *Erlanger* v. *New Sombrero Phosphate Company*. (5)

Jan. 12. BOWEN, J. This is an action brought by the Whaley Bridge Calico Printing Company, Limited, against Robert Ellis Green, the vendor to the company of certain works and premises. John Smith, a defendant joined in the suit, did not appear to

(1) 2 Ch. D. 1.
(2) 6 Ch. D. 371.
(3) 5 Ch. D. 394.
(4) 3 Ch. D. 722.
(5) 3 App. Cas. 1218.

1879

WHALEY BRIDGE PRINTING CO. v. GREEN.

defend, and the present question arises wholly between the defendant Green and the company.

In or about May, 1876, the defendant Green purchased certain calico printing works and premises situate at Whaley Bridge, near Buxton, for the sum of 15,000*l.* The defendant John Smith was the manager in Mr. Green's employment at the time, and various negotiations took place between Green and Smith as to the working of the premises for Green himself, and as to their resale to some company. Ultimately, on the 13th of October, 1876, the plaintiff company was incorporated for the purpose of purchasing and working these works, and on the 2nd of February, 1877, the premises were conveyed to the company by Smith and Green for the sum of 20,000*l.*, Green having previously purported to sell the premises to Smith for 20,000*l.* by a contract of the 19th of September, which the jury found was a sham contract, and which (if a sham contract) was obviously intended to be used for the purpose of the negotiations with the company.

The immediate question in the present case turns upon the following findings of the jury :—

1. That Green was a promoter of the company from the 29th of August.

2. That before the 2nd of February the board of directors knew that Green had previously purchased the property for 15,000*l.* only.

3. That at the date of the incorporation of the company there was an agreement between Smith and Green that Smith should have 3000*l.* out of the purchase-money paid by the plaintiff company.

It was agreed that the Court should have power to draw all further inferences of fact.

The first claim put forward on behalf of the plaintiff company was to have refunded to them the 5000*l.* the difference between the 20,000*l.* purchase-money, and the price at which Green himself had bought.

This claim, in my opinion, cannot be sustained. The company bought with their eyes open as to the price. They knew Green had in fact given only 15,000*l.* for the works. A fraud was no doubt practised upon them in respect of the contract of the 19th of

September, assuming the finding of the jury to be correct, for it is clear that Green and Smith induced the company to suppose that there was a genuine contract of sale for 20,000*l.*, under which Smith had become the purchaser. In reality, this contract was a mere sham, and Green, by the agreement referred to in the last finding of the jury, had arranged with Smith to pay him back 3000*l.* out of the 20,000*l.* purchase-money. It is true that the property in question appears upon the evidence to be fully worth 20,000*l.*, but this does not prevent the use made of the sham contract from having been fraudulent. In any action for deceit based on this ground a jury might perhaps have assessed at 3000*l.* the damages recoverable by the company against Smith and Green, should the jury have thought that this sham contract induced the company to give 3000*l.* more than they otherwise need have done.

The plaintiffs, however, have not asked for damages to be assessed in this manner. What they desire is to enforce against Green the secret agreement to pay over 3000*l.* to Smith, upon the ground that they are entitled to treat this contract with Smith as made for the profit of the plaintiff company and not for Smith.

The relief afforded by equity to companies against promoters, who have sought improperly to make concealed profits out of the promotion, is only an instance of the more general principle upon which equity prevents the abuse of undue influence and of fiduciary relations. The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In every case the relief granted must depend on the establishment of such relations between the promoter and the birth, formation and floating of the company, as render it contrary to good faith that the promoter should derive a secret profit from the promotion. A man who carries about an advertising board in one sense promotes a company, but in order to see whether relief is obtainable by the company what is to be looked to is not a word or name, but the acts and the relations of the parties. In the present instance, Green and Smith agreed to, and did bring out the present company for the purpose of purchasing the chemical works and premises on their own terms. The board of directors

1879

WHALEY BRIDGE PRINTING CO. v. GREEN.

consisted of their nominees, and in order to make the purchase run more smoothly a sham contract of purchase was on the 19th of September flashed before the eyes of the directors as if it were a real contract by both Smith and Green. The relation in which Smith by these acts placed himself towards the company is one in which equity will not allow him to retain any secret advantage for himself. He had a perfect right to agree with Green that he should be remunerated to the extent of 3000*l.* provided such agreement was made with the knowledge and assent of the company. But the company have a clear right to treat all profit made by Smith out of such a transaction as profit belonging to them, and it was hardly disputed, and in my opinion cannot be successfully denied, that if Green had actually paid the 3000*l.* to Smith, Smith might be compelled to pay over to the company the clear profit left after deducting what he had expended in the promotion. But it is said that the contract cannot be enforced against Green so far as it remains still unexecuted, that there is no instance which can be found in the books in which a company has been allowed to recover for its own benefit on a similar unexecuted contract, and that as Smith could not enforce against Green a contract based on an illegal consideration, so neither can the company.

This objection seems to me unfounded. There is, in the first place, nothing illegal in the contract that Smith should receive 3000*l.* out of the sale, provided it was not to be kept secret from the company when the company was induced to negotiate for the purchase. It is said, indeed, that the agreement for the 3000*l.* was anterior in date to the beginning of the promotion of this particular company. This may have been so; but the agreement, as the jury have found, was continued and applied to the formation of this particular company. As soon as Smith and Green formed the company and nominated its board, it became their duty, in my opinion, to inform the company of this private arrangement between them. Thereupon the company might either, at its option, decline the proposed purchase or accept it, claiming the benefit of Smith's bargain, or, might, if they thought it reasonable, sanction the agreement and allow Smith to retain the profit himself. The company cannot be worse off because the

existence of this contract was concealed from them. The contract, it is true, has not been as yet fully executed, but nothing remains to be done under it except the payment of money, and the right to this is a profitable right, of which the company are entitled to insist on availing themselves. It does not lie in Green's mouth to say that his own bargain with Smith was a fraudulent one and therefore cannot be enforced: Allegans suam turpitudinem non est audiendus. In order to recover against Green, the company do not indeed require to prove that Green was fraudulent. It is enough to shew that this is à profit coming to their agent to the benefit of which they are entitled. It is not, perhaps, every contract which a cestui que trust, even under similar circumstances, could in this manner enforce. In many unexecuted contracts the principal could not substitute himself in the agent's place, as the person for whose benefit the contract was to be performed, without altering substantially the character of the contract. But where nothing has to be done under the contract but payment of money to the agent, I think that the principal, under circumstances such as these, is entitled to stand in the agent's shoes and compel a payment of money directly to himself.

It has been contended, on behalf of the defendants, that neither in the statement of claim nor at the trial was relief sought on this ground; and it was further urged that it was too late for the plaintiff company to insist on suing Green for the 3000*l.*, inasmuch as before action brought Smith had himself brought an action against Green in his own name, and had received already two sums of 400*l.* each from Green under the agreement; one sum prior to the action, one sum as part of the terms on which he had agreed to abandon it. The defendants' counsel further urged that the settlement of this action between Green and Smith had been effected with the knowledge of the plaintiff company, and that it would be inequitable to allow the plaintiff company now to sue Green. It is true, the plaintiffs' right to enforce against Green the payment of the 3000*l.* was not a point made distinctly at the trial before the final speech at the trial of the plaintiffs' counsel; but it was made then, and made without objection by the defendants' counsel. And the course taken at the trial by consent of

1879

WHALEY BRIDGE PRINTING CO. v. GREEN.

all parties, was to leave certain specific questions of fact to the jury, and to reserve all other inferences of fact for the Court. It appears to me the plaintiffs cannot now be precluded from insisting on shaping their claim as they have done before me, and on the best opinion that I can form on the materials and correspondence before me, the plaintiff company never authorized, or sanctioned, or acquiesced in any settlement between Smith and Green which ought now to preclude them from bringing this action.

The advisers of the company were no doubt aware that Smith was suing on an alleged agreement of this kind, but they were led to believe by Green that no such agreement existed. I think that they are entitled still to call on Green to pay over 1200*l.* which is the balance payable to the company after deducting the 800*l.* already received by Smith, and to have delivered up to them the bill for 1000*l.*, the negotiation of which is sought to be restrained. (1) The plaintiffs therefore must have judgment for 1200*l.* with costs, and an injunction against the negotiation of the bill, coupled with an order that the bill be delivered up to them to cancel.

Judgment accordingly.

Solicitors for plaintiffs: *Clarke, Woodcock, & Rylands.*
Solicitors for defendants: *Dangerfield & Blythe.*

(1) The price of the works had been paid partly in bills, and this was the last of such bills that remained unnegotiated. The plaintiffs sought to restrain the negotiation of the bill, and set it off against 1000*l.* of the 3000*l.* agreed to be paid by Green to Smith.

SPAIGHT AND OTHERS *v.* FARNWORTH AND ANOTHER. 1880

Ship—Charterparty—Freight payable "on intake Measure of Quantity delivered" —Measurement at Port of Shipment—Loss of Part of Cargo. *Jan.* 12.

A cargo of deals and battens consigned to the defendants, was shipped on board the plaintiffs' vessel under a charterparty by which freight was to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1980 superficial feet, and on deal ends at the rate of 2*l.* 1*s.* 1*d.*, per the like hundred eight feet and under. "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." A bill of lading was signed for a specified number of pieces, deals, battens, and scantling, making freight payable "as per charterparty." The various pieces were, in the ordinary course of business, measured by the shipper at the port of shipment and their dimensions entered in a specification; the figures representing such dimensions being, before shipment, chalked on each piece respectively. During the voyage a number of the pieces were lost. The remainder was delivered at the port of destination, but the measurement figures put on some of the pieces delivered had become obliterated. The dimensions of the pieces lost were unknown; but there was some evidence that they were of average size compared with the rest of the cargo:—

Held, by Bowen, J., that under the charterparty freight was payable on the measurement figures as ascertained at the port of shipment, and not on the quantity delivered measured at the port of discharge, according to the intake mode of measurement; and that, having regard to the particular circumstances, the amount might be calculated by assuming that the pieces lost were of average size as compared with the remainder, and making a proportionate reduction from the sum total of the measurements in the specification.

THIS was an action for the balance of freight due under a charterparty.

At the trial before Bowen, J., at the Liverpool Summer Assizes, 1879, the case was reserved for further consideration, and was subsequently argued by

Herschell, Q.C., and *Kennedy*, for the plaintiffs.

C. Russell, Q.C., and *Warr*, for the defendants.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

1880. Jan. 12. BOWEN, J. The question in this case is as to the manner in which freight should be calculated and paid upon a cargo of deals and battens carried by the ship *Shannon*, from St. George's, New Brunswick, to Liverpool.

The plaintiffs are managing owners of the ship *Shannon*, and

1880

SPAIGHT v. FARNWORTH.

the defendants are timber merchants and brokers at Liverpool, and consignees of the cargo in question.

The charterparty under which the freight was payable and on the construction of which the matter partly turns, was dated the 5th of September, 1878.

The cargo was to consist of deals and battens, with deal ends for broken stowage. Freight was by the charterparty to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1980 super. feet, and on deal ends at the rate of 2*l.* 1*s.* 8*d.* per the like hundred, eight feet and under. The charterparty contains the following provision as to freight. "Freight payable on deals and sawn lumber, on the intake measure of quantity delivered."

A cargo of deals and battens and deal ends was duly shipped at St. George's, by A. H. Gilmor, jun. & Brothers, for Liverpool, consigned to the defendants, and the bill of lading was signed for a specified number of pieces, deals, battens, and scantling, and a specified number of pieces deal ends; and freight was payable as per charterparty.

The usual course of business at St. George's, and the one adopted in this instance with respect to the measurement of timber, is for the shipper to make up his specification shewing the number of pieces shipped of various dimensions. The dimensions are arrived at by measuring the length, breadth, and depth of the various pieces of timber, and on each piece of timber before shipment is chalked the figures representing its dimensions.

There are various ways of measuring the dimensions of timber; the overall method of measurement is one measurement, by the diaper is another. The overall measurement is that adopted at St. George's. In the measurement of the timber the ship takes no part. The pieces are measured alongside of the ship by the surveyor of the shipper, and pass directly from the surveyor's hands to the ship.

There is no dispute as to the exact number of pieces of timber that were shipped. The cargo consisted of between 30,000 and 40,000 deals, and between 3000 and 4000 deal ends. During the course of the voyage, owing to the severe weather encountered by the vessel, 348 deals and 303 deal ends were lost. The remainder

was duly delivered. On some of the pieces delivered the measurement put on at St. George's had become obliterated during the voyage. On some the measurement still remained marked. The dimensions of the timber that was lost were not known either to the ship or consignees, but there was some general evidence that the dimensions of the quantity lost were average dimensions as compared with the rest. What was done on landing was as follows:—The defendants took the St. George's marks as the true dimensions on all the pieces were the figures still remained visible. They remeasured de novo according to the overall mode of measurement all the pieces where the figures had become illegible. The defendants claim to pay freight upon these two sets of figures.

The result, however, of this mode of calculation would be that the dimensions so arrived at for the delivered cargo, if deducted from the total dimensions in the specification, would make the residue representing the quantity lost on the voyage to have been of most unusual and abnormal dimensions, three or four times as great as the other sizes of timber shipped, assuming always that the specification was accurate. The plaintiffs, the shipowners, object to this method of assessing freight, and assuming that the pieces lost were a fair average of the cargo, and propose to deduct the proportion which the lost pieces bore to the rest of the cargo, and to pay for what has arrived and been delivered on the St. George's specification. It is between these two methods of assessment that I have to decide, and the first question is the meaning of the words in the charterparty, "Freight payable on the intake measure of the quantity delivered." The plaintiffs contend that these words mean freight payable on the measure actually attributed at the port of shipment to so much of the cargo as was delivered subsequently; the defendants, on the other hand, contend that "on the intake measure of quantity delivered" must be construed as equivalent to "on the quantity delivered measured according to the intake mode of measurement," that is to say, the overall mode of measurement to be adopted on measurement taken not at the port of shipment but at the port of discharge.

As a general principle freight, in the absence of special agree-

1880

SPAIGHT v. FARNWORTH.

ment to the contrary, becomes payable only on so much cargo as has been both shipped, carried, and delivered.

If less has been shipped than has been delivered, as in the case of cargoes which heat under sea-water damage, freight is payable on the lesser quantity shipped. If less has been shipped and carried than has been delivered, as for instance in the case of goods which are compressed during the voyage and expand on being unloaded, freight is payable on the compressed and not on the expanded measurements. If, on the other hand, less has been delivered than shipped, as in the case of goods lost on the way, then freight would be payable only on the quantity delivered.

For the convenience of business, contracts are frequently made to vary this primâ facie rule. Inconvenience in practice must obviously often arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculations of freight. Timber, of course, is a cargo that is not liable to change its dimension between its time of shipment and its time of delivery; but the mode of measuring timber differs in various ports, and probably there is a considerable difference in the accuracy of the modes, and the measurement of large cargoes of timber, moreover, is probably conducted with more expedition than exactness. There is nothing accordingly unnatural that the ship and the charterer should agree that freight is to be paid on the measurement figures arrived at at the port of lading. The shipper who is interested as between himself and his consignee, in not understating the timber in his specification, is a person whose measurements the ship can afford to trust. This is what seems to me to have been done in the present instance. The plain meaning of the words in the charterparty is that freight is to be paid on the intake, that is to say, the shipment measure is dimensions of the actual quantity delivered. The measure, that is to say, which the surveyors put upon the timber when it is measured for the purposes of the specification before shipment alongside the ship. I see no reason for attributing to the words "intake measure" the less obvious meaning "intake method of measurement."

A provision that one principle of measurement should govern, would, no doubt, for purposes of business, be more convenient than

no provision at all, but it would not obviate all measurement disputes which I think this charterparty desired to prevent, and it seems to me that it is more probable that freight was meant to be paid on the intake figures, which will be found recorded in the specification, and so far as they remain legible on the timber actually delivered.

Assuming this to be the true construction of the charterparty, is the calculation proposed by the defendant or the plaintiff the best mode of arriving at the question what freight is to be paid?

In the present instance part of the timber was delivered with the marks still on it. On part the marks were defaced and part has been lost midway.

If the above construction of the charterparty be correct, what has to be discovered is not the accurate measurement, as taken here, of the quantity delivered, but the measurement attributed at the port of loading to so much as has arrived and been delivered safely.

The competitive modes of calculation between which I have to decide are as follows:—

1. The pieces thrown overboard or lost, are assumed, in accordance with the captain's evidence, to be a fair average size as compared with the rest of the cargo. The proportion which they bear on this assumption to the rest of the cargo is deducted from the specification total, and freight is charged upon the residue. This is the plaintiffs' method.

2. The pieces on which the marks remain are taken at the figures still chalked upon them. The pieces on which the marks are obliterated are re-measured; freight is paid upon the total so arrived at. This is the defendants' method.

It is obvious, to my mind, that neither of these methods can be said to be anything but a rough way of arriving at the measure attributed at the port of shipment to the quantity delivered here. As to (1.) the plaintiffs' method, it is based in the first place on a rough calculation of the average size of the cargo that has been lost. It was not suggested before me that the specification figures were not correct reproductions of the measurements actually arrived at at the port of loading, though if the point had been taken and pressed, evidence might have been necessary to shew that the measurements taken, whatever their correctness at St.

1880

SPAIGHT v. FARNWORTH.

George's, were accurately entered in the specification. It was no doubt contended on the part of the defendants that they ought not to be bound by a measurement to which they were no parties; but though the defendants are not bound by the specification, as such, they are bound, in my opinion, by the figures taken at the port of loading; and assuming, as I do, that those figures are correctly entered in the specification, in that sense, and to that extent, the defendants are bound by the specification. I can conceive that far better proof might have been given of the exact dimensions attributed at St. George's to the timber delivered here, but, rough and rude as the plaintiffs' method of calculation is, it seems to me to be founded on the real materials for a judgment, viz. the shipment figures, or what, in this case, I treat as synonymous with those in the specification.

The assumption that the pieces lost were of an average size is a piece of evidence which might certainly have been displaced, but still, until it is displaced, may properly be acted on. It is not exact evidence, but it is primâ facie evidence, and, having no better, I accept it.

The weakness of (2) the defendants' method of calculation, to my mind, is that in re-measuring the unmarked timber here the defendants forgot that what has to be discovered is not the exact measurement of the goods delivered, but the measurement affixed to those goods at St. George's on shipment. It is evident that there was some difference, probably some mistake, in part of the St. George's figures, and this mistake was one to the benefit of which the ship was entitled so far as it relates to the timber actually delivered. The defendants' method, by adopting the St. George's measure in part only, deprives the ship of the chance which in this case is a very appreciable one, that the St. George's measurements of the timber, on which the marks had been obliterated, were more in the ship's favour than the measurements retaken here. The object, I think, of the charter was that the shipment measurements should be taken as accurate. Errors of measurement in part would be corrected by opposite inaccuracies in another part. This object the defendants defeat by assuming that as to part the shipment figures are correct, while as to part the defendants substitute re-measurement of their own.

1880

SPAIGHT v. FARNWORTH.

I prefer of the two the plaintiffs' method as directed, however roughly, to the true problem which has to be solved, viz. the intake measure, that is to say, the intake figures and dimensions actually attributed at the port of loading to so much of the cargo as has been delivered safely.

Judgment will therefore be for the plaintiffs, with costs.

If there was no mistake in the St. George's measurements, and if the mode of measuring here must produce identical results with the mode of measurement at St. George's, the plan of the defendants would be unimpeachable; but the defendants have no right to take the benefit of either of those assumptions.

Solicitors for plaintiffs: *Gregory & Co., for Stone & Fletcher, Liverpool.*

Solicitors for defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

THE PROTECTOR ENDOWMENT LOAN AND ANNUITY COMPANY *v.* GRICE.

Jan. 20.

Bond—Loan payable by Instalments—Balance payable upon default in Payment of one Instalment—Interest and Expenses of Life Insurance—Penalty—Relief of Debtor.

The plaintiffs lent money to S. upon his bond, under which the principal was to be paid in five years by instalments, in case the debtor should so long live; the instalments being calculated so as to cover the principal of the loan; interest thereon; the expenses of negotiating it, and a margin representing a premium for the insurance of the debtor's life. The condition of the bond made it void; first, if the instalments were regularly paid till the expiration of the five years or till the death of the debtor, whichever should first happen; secondly, if all the instalments which would have become payable at the expiration of the five years, if the debtor lived so long, were at any time paid up, the balance of instalments being at once payable on the failure of any single instalment.

The defendant as surety executed the bond, and default having been made in payment of one instalment, the plaintiffs brought an action claiming the entire balance of unpaid instalments:—

Held, by Bowen, J., that the amount claimed was a penalty, and could not be recovered; and that the defendant upon payment into court of the unpaid instalment with interest, was entitled to have the action dismissed.

Revd by C.A. post 592

THIS was an action on a bond, tried before Bowen, J., without a jury, at the London sittings in December, 1879. The pleadings and facts are referred to in the judgment.

1880

PROTECTOR ENDOWMENT LOAN CO. v. GRICE.

Herschell, Q.C., and *Archibald*, for the plaintiffs, contended that the covenant for the payment of the balance of the instalments on the bond was part of the original security and did not impose a penalty. [They referred to *Peachy* v. *Somerset* (1); *Sloman* v. *Walters* (2); *Sterne* v. *Beck* (3); and relied on *Preston* v. *Dania* (4), as shewing that as in the case of a bond to secure the payment of money by instalments, the obligee was entitled to his judgment for the whole amount as a security in case of future breaches.]

Bompas, Q.C., and *Fulton*, for the defendant, and *Clare*, for another surety who was brought in as a third party, contended that the amount claimed was a penalty, and could not be enforced. They cited *Thompson* v. *Hudson*. (5)

Cur. adv. vult.

Jan. 20, 1880. BOWEN, J. This is an action brought upon a joint and several bond executed by one Charles Simpson as principal and the defendant, and another as sureties, by which the obligors became jointly and severally bound to the plaintiff company in the penal sum of 100*l.*, with conditions for making void the bond to which I will presently refer.

The plaintiff company are in the habit of advancing money on loan, and agreed to advance 50*l.* to Charles Simpson, the defendant being one of his sureties. The loan was to have been paid in five years by instalments, in case the debtor should so long live; the plaintiff company taking the risk of his death in the interim. The instalments were calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, and a margin representing a yearly premium for the insurance of the debtor's life.

The condition of the bond, so far as the same is material, is as follows:—

"If the obligors or some or one of them, or some or one of their heirs, executors, administrators, do and shall from henceforth on every 1st of September, 1st of December, 1st of March, and 1st of June, until June 1, 1882, inclusive of that day, or until the day

(1) W. & T. L. C. 3rd ed. vol. ii. p. 979.

(2) W. & T. L. C. 3rd ed. vol. ii. p. 991.

(3) 1 De Gex J. & S. 595; 32 L. J. (Ch.) 682.

(4) Law Rep. 8 Ex. 19.

(5) Law Rep. 4 H. L. 1.

1880

PROTECTOR ENDOWMENT LOAN CO. v. GRICE.

of the death of the principal, if he shall die before that day, pay to the company, or their successors or assigns, without demand, at their office, 34, King Street, Cheapside, 3*l.* 10*s.*, or if the obligors, &c., shall and do in any or either of the events mentioned or indorsed on this present bond, immediately pay to the company, their successors or assigns, not only any sum of 3*l.* 10*s.* which may have become due and payable, but all and every the sums of 3*l.* 10*s.* which would have become due and payable if the principal had outlived the said 1st of June, 1882, and such day had actually arrived, and if the obligors, &c., shall pay to the said company all costs, charges, and expenses to be paid or incurred by the said company in enforcing or attempting to enforce the above written bond against the obligors, their heirs, &c., or otherwise incident to or consequent upon any breach or default of the foregoing conditions, or any of them. Then the above written bond or obligation shall be void, otherwise the same shall remain in full force."

Indorsed upon the back of the bond is a list of the events referred to in the within written bond, which includes, amongst others, the following event:—

"If any sum within conditioned to be paid shall be in arrear and unpaid."

It appears from the above extract that the bond is conditioned in the alternative. It is to be void (1.), if the instalments of 3*l.* 10*s.* are regularly paid till 1882, or till the death of the debtor, whichever shall first happen, or (2.), if all the instalments which would have become payable in 1882, had the debtor lived so long, are at any time paid up. And, as will be seen, there is a provision which makes the balance of instalments at once payable on failure of any single instalment.

Neither of the alternative conditions has been fulfilled. Default was made in the payment of the instalment of 3*l.* 10*s.* upon the 1st of December, 1878. Thereupon the plaintiff company brought this action on the bond, claiming under the provisions hereinbefore set forth, to be repaid immediately the entire balance of future unpaid instalments, amounting in all to 52*l.* 10*s.*

The defendant pleaded that the plaintiff company were seeking, contrary to the principles of equity, to enforce a penalty, and

1880

PROTECTOR ENDOWMENT LOAN CO. v. GRICE.

paying into court 3*l.* 10*s.*, the amount of the unpaid instalment already due, asked to have the action dismissed.

If the provision which the plaintiffs desire to have enforced has merely been that on default of the instalment the unpaid balance of the principal money lent should become due and payable, the case would have fallen under the principle laid down in *Thompson* v. *Hudson*. (1) A provision reviving an original debt in case of breach of one of the terms on which the payment of the debt was alone postponed, is not a penalty, being something more than a mere security for the payment of the instalment. The present case is different. On non-payment of a single instalment the surety, if the plaintiffs' contention be correct, becomes liable to pay down a balance of unaccrued instalments, which really represent—

(1.) The arrrears of instalment actually overdue.

(2.) Unpaid principal and expenses.

(3.) A margin calculated to cover interest which, if the debtor had lived to the end of the five years' term, would by that time have become due.

(4.) A further margin, calculated to cover the annual premiums which, if the loan had remained outstanding for five years would have been paid yearly during the period to meet the risk of the debtor's death.

And the surety would have to pay this sum down, losing the chance that the debtor might die within the five years. Then the company by a single default, if their present claim is maintainable, receive not merely their money back with interest and expenses, but a godsend in the shape of the unpaid premiums for a life insurance which no longer will be kept up, and the future interest on a loan which will long have ceased to be outstanding.

To allow the company to acquire this advantage by reason of a default in payment of an instalment, would be, I think, to allow them to inflict a penalty. It is argued that this clause is part of the bargain between the parties, and a security not merely for the payment of the instalment, but the original security on which the money was lent.

So in one sense is every penalty for non-payment of interest. The question is not whether it is a part of the bargain, but

(1) Law Rep. 4 H. L. 1.

whether it is such a part as equity will enforce: not whether it is one of the terms on which the money was lent, but whether the main purpose of the term was to secure the payment of the instalments. If, indeed, all that was sought to be recovered was the unpaid principal and expenses, together with the arrears of the overdue instalment, the plaintiffs would be entitled to succeed: but the plaintiffs have not asked and do not ask this, probably because they do not want their money back,—what they want is the god-send, profit or bonus, which is to arise from the non-observance of a money payment. The provision relied on is not, as in *Thompson* v. *Hudson* (1), a provision which revives an old right, but a provision creating a new right which is to come into operation on default in a payment of money. The principal obligation is to pay the 72*l.* by instalments. The provision seems to me to be a security for the performance of this obligation—in other words it is a penalty.

It may be said that there is nothing unreasonable in the bargain sought to be enforced if the parties choose to make it, but that is not the question. The rule of equity which prohibits the infliction of penalties, comes down to us from a time when borrowers of money were believed to require special protection against improvident contracts: but whatever the origin of the rule of equity, whatever its economical merits, it exists,—effect must be given to it when a case arises which falls within it.

The defendant has not paid into court with his plea sufficient by a few shillings to cover his instalment with interest. I think the omission was accidental, and treat it as an oversight. On payment to the plaintiff company, or into court, of the additional sum necessary to make up the interest, the defendant is to have judgment: costs up to the statement of defence are to be paid by the defendant: costs subsequent to the statement of defence by the plaintiffs.

Judgment accordingly.

Solicitor for plaintiffs: *T. H. Devonshire.*
Solicitors for defendant: *Cronin & Rivolta.*

(1) Law Rep. 4 H. L. 1.

1879
Dec. 3.

THE QUEEN ON THE PROSECUTION OF SMITH, RESPONDENT; PADBURY, APPELLANT.

Bastardy—Order for Maintenance—Omission to provide for Education of Child—35 & 36 Vict. c. 65, s. 4—Order to take effect from Date of Application.

By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4, justices may make an order on the putative father of a bastard child for the payment to the mother of a sum of money weekly "for the maintenance and education of the child; . . . and if the application be made . . . within two calendar months after the birth of the child, such weekly sum may, if the justices think fit, be calculated from the birth of the child:"—

Held, that an order of maintenance made under the above Act, but which was in the form in the schedule to 8 & 9 Vict. c. 10, directing the payment to be made to the mother, without any provision for its application to the maintenance and education of the child, was invalid, and must be quashed.

Semble, that an order of maintenance under 35 & 36 Vict. c. 65, s. 4, may be made so as to operate from the date of the application for a summons.

UPON appeal to the Warwick sessions against an order of affiliation, the order was confirmed, subject to the following case.

The order, omitting the formal parts, was as follows:—

"At a petty sessions, &c., at Brailes, Warwick, on the 8th of February, 1879: whereas one E. H. Smith, single woman, residing at Willington, Warwick, did on the 25th of January, 1879, having been delivered of a bastard child within twelve calendar months prior thereto, make application to a justice for a summons to be served upon J. Padbury of Willington, whom she alleged to be the father of the child, and the justice thereupon issued his summons, &c. . . . . and it being proved that the child was on the 13th of December, 1878, born a bastard, &c., we hereby adjudge the said J. Padbury to be the putative father of the bastard child, and having regard to all the circumstances of this case we do now hereby order that J. Padbury do pay unto E. H. Smith, the mother of the child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such child, under the provisions of an Act passed in the eighth year of the reign of her present Majesty, intituled 'An Act for the Further Amendment

of the Laws Relating to the Poor in England,' the sum of two shillings per week from the 25th day of January last, being the day upon which such application was made to the justice as aforesaid, until the child shall attain the age of thirteen years or shall die."

It was objected at the hearing of the appeal that the order of affiliation was bad. First, because the justices had no power to order the payment of the two shillings per week from the 25th of January, 1879, the date on which the respondent made application for a summons, but ought to have made such order either from the date of the birth of the child, or from the date of their order. Secondly, because the order was for the payment of the two shillings per week by the appellant to the respondent absolutely, and contained no direction for the application of the sum, or any part thereof, for the maintenance and education of the bastard child of the respondent, in accordance with the provisions of the Bastardy Laws Amendment Act, 1872 (1), and the statutes amending the same.

If the Court should be of opinion that the objections, or either of them are good, the order is to be quashed, if otherwise, to be confirmed.

Soden, for the respondent. First, it can be no objection to the order, under 35 & 36 Vict. c. 65, that it is made to operate from the date of the application for a summons. The Act has impliedly sanctioned such an order by allowing it to operate from the birth of the child. [He was stopped on this point.] Secondly, it will be objected that the order is in the form in the schedule to 8 & 9 Vict. c. 10, directing the payment to be made to the mother of the child unconditionally, whereas sect. 4 of 35 & 36 Vict. c. 65, enacts that the payment shall

(1) By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65, s. 4), justices in petty sessions may, if they see fit, having regard to all the circumstances of the case, make an order on the putative father of a bastard child for the payment to the mother . . . . of a sum of money weekly not exceeding 5*s*. "for the maintenance and education of the child, ... and if the application be made . . . . within two calendar months after the birth of the child, such weekly sum may, if the justices think fit, be calculated from the birth of the child."

1879

THE QUEEN v. PADBURY.

be for the maintenance and education of the child. But the later Act does not repeal the forms in the schedule to 8 & 9 Vict. c. 10. Sects. 2 and 3 of 7 & 8 Vict. c. 101 are repealed, but the material part of sect. 5, which directs the money to be paid to the mother, is allowed to remain. Moreover, sect. 4 of 35 & 36 Vict. c. 65, only requires the justices to make the prescribed order if "they see fit."

[COCKBURN, C.J. Under 7 & 8 Vict. c. 101, a mother who had obtained an order could be compelled to maintain the child. 35 & 36 Vict. c. 65 goes further, and directs that the money shall be paid to her for the maintenance and education of the child. And if the justices make an order it must be in the prescribed form.]

Lastly, it is submitted that the Court will amend the order under 12 & 13 Vict. c. 45, s. 7.

Vesey Fitzgerald, for the appellant, was not heard.

COCKBURN, C.J. The omission to provide for the maintenance and education of the child in the order is fatal to its validity, and it must be quashed. We cannot amend it, for 12 & 13 Vict. c. 45, s. 7, only applies to a mistake in drawing up the order, but not to a mistake in point of substance.

MANISTY, J., concurred.

Judgment for the appellant.

Solicitors for appellant: *Routh, Stacey, & Castle.*
Solicitor for respondent: *R. H. Davies.*

GLYN, MILLS, CURRIE, & CO. *v.* THE EAST AND WEST INDIA DOCK COMPANY.

1880
Jan. 23.

Sale of Goods—Bill of Lading—Title of First Indorsee—Production of Unindorsed Copy—Warehouseman, liability of.

Goods having been shipped for London consigned to C. & Co., the shipmaster signed a set of three bills of lading, marked "First," "Second," and "Third," respectively, making the goods deliverable "to C. & Co., or their assigns, freight payable in London, the one of the bills being accomplished, the remainder to stand void." During the voyage, C. & Co. indorsed the bill of lading marked "First" to the plaintiffs for valuable consideration. Upon the arrival of the ship at London, C. & Co., entered the goods as consigned to them, and they were landed and placed in the custody of the defendants in their warehouses; the master lodging with the defendants notice under the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to and lodged with the defendants, the second part of the set of bills of lading. The defendants accordingly entered C. & Co. in their books as enterers, importers, and proprietors of the goods, and the stop for freight being afterwards removed, they delivered the goods to various persons upon delivery orders signed by C. & Co.:—

Held, by Field, J., that the defendants were liable in an action by the plaintiffs for the value of the goods, for without deciding whether the master could have been exonerated by a delivery of the goods to the person first presenting a bill of lading, the defendants were not by receiving the goods, subject to the stop for freight, placed in the same position as the master and entitled to his rights; and further, that in delivering the goods upon the order of C. & Co., they had acted in a character beyond that of mere warehousemen, and were guilty of a conversion.

ACTION by the plaintiffs as indorsees and holders of the bills of lading for certain goods deposited with the defendants, to recover 600*l.*, the value of such goods.

1879. Dec. 8. The case came on for trial before Field, J., without a jury, when the points of law were argued by

Herschell, Q.C., and *J. C. Mathew*, for the plaintiffs.
Watkin Williams, Q.C., and *Pollard*, for the defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.

1880

GLYN, MILLS, CURRIE, & Co. v. EAST AND WEST INDIA DOCK Co.

Jan. 23. FIELD, J. This action was tried at the last Guildhall sittings before me, sitting without a jury, and after argument, I reserved my judgment. The question raised in it is whether the plaintiffs are entitled to recover as against the defendants the value of some West India produce represented by bills of lading of which they are the bonâ fide indorsees and holders for value, under the following circumstances:

On the 15th of May, 1878, the plaintiffs advanced the sum of 13,000*l.* to Messrs. Cottam, Morton, & Co., upon the security of a large quantity of produce of which Cottam & Co. were the consignees and owners, and the bills of lading representing which they indorsed and delivered to the plaintiffs by way of collateral security for the advance. A part of this produce consisted of sugar which had been shipped at Jamaica, and was then at sea on board the "*Mary Jones*," and as the facts in reference to this sugar are substantially identical with those relating to the rest of the produce, it was agreed upon the argument that the facts and principles applicable to the produce, ex *Mary Jones*, should represent the whole. The bills of lading thus indorsed and delivered, had been as usual, signed by the master in a set of three, and each of the set was conspicuously marked "First," "Second," and "Third." They were dated April 15, and represented the goods as deliverable to "Cottam & Co., or their assigns;" freight being made payable in London, and they contained the usual clause by which it was witnessed that the master had affirmed to three bills of lading, "the one of which bills being accomplished, the rest to stand void." It was the "First" of the set which Cottam & Co. transferred to the plaintiffs, and it was the only one which they ever indorsed. Contemporaneously with the advance, Cottam & Co. also signed a memorandum of deposit of the goods, by which the advance was made repayable on July 15, liberty was given to the plaintiffs to realise the goods in the event of default or "other case of need," and the memorandum contained provisions for the insurance of the goods by Cottam & Co. against fire, and for the application of any money recovered under the policy in part liquidation of the advance. The *Mary Jones*, which was a general ship, arrived in London, her port of discharge, on the 28th of May, and on that day Cottam & Co. made entry of such of the

goods on board as were consigned to them, being the goods in question, and those goods as well as the rest of the cargo were landed and placed in the custody of the defendants in their warehouses. On the same day the master lodged with the defendants a copy of the manifest of the whole of his cargo, at the foot of which he signed an authority to the defendants to deliver the goods to the "holders of the bills of lading." On the following day, May 29, the master lodged with the defendants notice, under s. 68 of the Merchant Shipping Act Amendment Act of 1862, directing the defendants to detain the cargo until the freight should be paid.

On the 31st of May, the consignees of the goods in question, Cottam & Co., produced to or lodged with the defendants the "Second" part of the set of three of the bills of lading of the goods in question, and the defendants then entered Cottam & Co. under appropriate columns in their books as the "Enterers," "Importers" and "Proprietors" of the goods. Nothing further appears to have been done as to the goods until the 7th of June, on which day the stop for freight was removed, and the goods remained in the defendants' custody until the 3rd and 8th of July, on which days they delivered them to Messrs. J. & E. Williams for their own use and benefit, under delivery orders signed by Cottam & Co. on the 2nd of July, and lodged by them with the defendants on the following day. In the case of some of the other produce forming part of the plaintiffs' security, the defendants made out warrants in favour of Cottam & Co., upon orders lodged by them, and the deliveries were as per the indorsements on the warrants to third parties. These orders for warrants and for delivery were lodged by Cottam & Co., and the deliveries under them were made entirely without the knowledge of the plaintiffs, and Cottam & Co. having filed their petition for liquidation on the 15th of August, with a large balance due by them to the plaintiffs, the latter proceeded to resort to their security. On application, however, to the defendants, the plaintiffs discovered the dealings which had taken place with their goods as above detailed, and having made a subsequent demand of delivery, with which, of course, the defendants could and did not comply the present action was brought.

1880

GLYN, MILLS, CURRIE, & CO. v. EAST AND WEST INDIA DOCK CO.

The question involved is the one so often unfortunately raised in Courts of Justice as to which of two innocent parties is to suffer by the dishonest dealing of a third, and the only course open to a Court, in such a case, is to ascertain upon which of the parties the loss is cast by the operation of the rules of law applicable to the case, and decide accordingly. In this action the question is one of considerable mercantile importance, and I have taken time to consider the authorities applicable to it, but the legal result of the facts has always seemed and now seems to me reasonably plain.

By the pledge by Cottam & Co., who were unquestionably the owners of the goods, to the plaintiffs on the 15th of May, and the delivery to them of the indorsed bills of lading the plaintiffs as unquestionably became entitled to all Cottam & Co.'s rights. This is established (if authority be necessary) by the case of *Meyerstein* v. *Barber* (1), cited in the argument. It is true, however, that the plaintiffs' right of immediate possession was subject to one limitation, viz., the payment of freight on the arrival of the goods, but upon payment of the freight on the 8th of June, or at all events after the subsequent demand and refusal, the right of immediate possession as well as property was clearly vested in them. It is certain that the plaintiffs have never in any way intentionally parted with either of their rights, and the only mode by which the defendants can justify their delivery of the goods upon the order of Cottam & Co. must be either by some act or conduct of the plaintiffs, either of omission or commission, whereby they have held out to the defendants and induced them reasonably to believe that Cottam & Co. were the owners of and entitled to deal with the goods as their own property, or by some title paramount to that of the plaintiffs, by the coming into effect of which their title was divested. It was admitted by the learned counsel for the defendants upon the argument that the plaintiffs had not been guilty of any laches or negligence so as to estop them from setting up their title, and, after a careful consideration of the evidence, I am unable to find that there was any act or conduct done or pursued by them whereby they in any way held out Cottam & Co. to the defendants as authorized, or induced

(1) Law Rep. 2 C. P. 39.

the defendants to believe that they were authorized, to deal with the property in the goods. The omission to inquire for or take possession of the "Second" part of the bill of lading or to give notice of the indorsement to them of the "First" were urged by the defendants' counsel as thus operating, but similar arguments were also unsuccessfully relied upon in the case of *Meyerstein* v. *Barber* (1), and I can give such contention no better answer than it there received in the judgment of Lord Hatherley. It was upon the argument further admitted, upon the authority of *Meyerstein* v. *Barber* (1), that as against the persons who took the goods under the warrants or delivery orders, the plaintiffs' rights of property were sufficient to entitle them to recover the value of the goods; but it was said that this was not so as against the defendants, in whose case the question was not one of property, but of contract, and it was urged that the delivery of the goods to Cottam & Co.'s order, which was the act complained of, was justified by the terms of the bills of lading (subject to which the plaintiffs admittedly took the goods), the defendants being, as was said, in the same position as the master of the *Mary Jones*, the goods being, as was said, in the same position as if they were still in her hold.

This contention was based upon the fact that, the freight remaining, as it did, unpaid on the 29th of May, the master had availed himself of the provisions of the Merchant Shipping Act of 1862, by lodging with the defendants the notice to detain the goods, and that was said to have constituted the defendants the agents of the master for delivery. The alleged right of the master to deliver to Cottam & Co. rested upon the contention that, as he had for (as it was said) the convenience of the merchant made three copies of the bill of lading, whereby the goods were deliverable to Cottam & Co. by name "or assigns," the presentation by Cottam & Co. of any one copy, although unindorsed, without notice of any previous indorsement of any other part of the bill would have rendered it compulsory upon the master to deliver, or, at all events, have justified him in delivering, the goods to the consignees, notwithstanding that they had previously assigned the bill to the plaintiffs. It was urged

(1) Law Rep. 4 H. L. 317.

1880

GLYN, MILLS, CURRIE, & Co. v. EAST AND WEST INDIA DOCK CO.

that there would be a great hardship in making the master liable to the previous indorsee in such a case, as it would compel him to decide upon conflicting claims without the means of deciding which of them was best founded, and it was said by the presentation of one copy by the consignee the bill of lading became by the very terms of it "accomplished," and so the plaintiffs' copy stood "void." No direct authority in support of the proposition—as between the master of a ship and a consignee named in a bill of lading who, having a right to indorse, had previously transferred his property in the goods and indorsed the bill of lading for value to a third party—was cited. Mr. Herschell, indeed, at the close of his argument, referred to certain authorities on which, as he anticipated, Mr. Watkin Williams would rely for the defendants; but although the latter to some extent urged propositions in the direction of which those authorities tend, he did not cite them in support of his argument. I have, however, thought it my duty to examine them, and this seems to be the result.

The earliest case is that of *Fearon* v. *Bowers* (1), which was cited by Lord Loughborough with approval in his celebrated judgment in *Lickbarrow* v. *Mason* (2), in which in a case of stoppage in transitu by the vendor, where the prior indorsee for value from the purchaser brought an action against the master, who had delivered to the vendor's agent upon production of a copy subsequently indorsed to him by the vendor, the master was held by Chief Justice Lee entitled to succeed. In this case a mercantile usage is reported as having been proved that when bills of lading are indorsed to different persons, the master has a right to deliver to whichever he thinks proper, and is discharged by a delivery to either, and is not obliged to consider the merits of the different claims, and it was upon that evidence that Chief Justice Lee directed a verdict for the defendant. This case was also cited with approval by Dr. Lushington in the case of *The Tigress*. (3) The latter case was cited in the argument of *Meyerstein* v. *Barber* (4), and although not noticed in the judgment, Lord Westbury is reported to have said that possibly the ship-

(1) 1 Sm. L. C. 5th ed. p. 705, n.
(2) 1 Sm. L. C. 5th ed. p. 601.
(3) 32 L. J. (P. M. & A.) 97.
(4) Law Rep. 4 H. L. 317.

owner might be justified in cases like that before him, between two indorsees of the bill of lading, in delivering to the person producing the bill of lading. It is, however, to be observed that the views of these two eminent judges were not necessarily the foundation of their judgment in either case; and in *Meyerstein* v. *Barber* (1) Mr. Justice Willes seems to have entertained a different opinion, and the doctrine thus enunciated seems to conflict strongly with the general doctrine of the liability of wharfingers, warehousemen, and other bailees, who it is clear are under the obligation under similar circumstances to decide between rival claimants at their peril or to interplead (see per Willes, J., in *Meyerstein* v. *Barber* (1); *Wilson* v. *Anderton* (2)).

In the present case it is not, however, necessary for me to decide this question, for I am of opinion that the defendants did not at the time that they delivered the goods upon Cottam & Co.'s orders occupy the position, or have vested in them, any such right or obligation, of the master, if it exist. It seems to me that the only authority conferred upon the defendants by the master was to detain until payment of the freight, and then to deliver to the holder of the bill of lading. Upon the release of freight on June 8, the interest and duty of the master ceased, and the defendants became either simple agents for the holders of the bills of lading or mere bailees of Cottam & Co. under the entry of the goods made by them. In support of this first view of their character, even if that be not the implication of law resulting from the facts, it is to be observed that on the day before the master lodged the stop-freight he had lodged a copy of his manifest on a printed form supplied by the defendants for use at their docks. By the terms of this document, as originally printed, the master purported to give an authority to the defendants to deliver the goods to "the consignees or holder of the bill of lading," and it also contained directions applicable to a case in which the master himself, in default of the consignees taking delivery of the cargo, deposits the goods with the dock company under the provisions of the Mercantile Shipping Act Amendment Act; but as in this case the consignees, Cottam &

(1) Law Rep. 2 C. P. 39, at p. 55. (2) 1 B. & Ad. 450.

1880

GLYN, MILLS, CURRIE, & Co. v. EAST AND WEST INDIA DOCK CO.

Co., took delivery and entered the goods, the master, before signing the copy manifest, struck out all the latter part, and also struck out the word "consignees," leaving, therefore, the authority merely to deliver to the "holder of the bill of lading," in other words, to the plaintiffs, who alone filled that character, and of whom therefore after the payment of the freight the defendants would become the agents. If, on the other hand, the defendants are to be regarded, as it seems to me they are, as the warehousemen, or ordinary bailees of Cottam & Co., then they have no better title as against the plaintiffs than their bailors, and cannot justify the delivery to the orders of the latter: see *Batut* v. *Hartley*. (1) If it is said to be a hardship on the defendants that they should be liable for delivery upon the production of the second part of the bill of lading without any knowledge of a previous indorsement; it may be observed that they had the remedy in their own hands, as the part so produced was conspicuously marked "Second," and they had only to require the production of the "First" part which, as is well known, is usually sent to the consignee, and in case of the non-production of it, to take an indemnity before delivery.

Indeed that is the course pursued by the defendants in their East India trade, in which the original bills of lading only are accepted, and in case of loss the defendants require satisfactory proof of title and an indemnity; thus shewing that, in that trade at least, precautions are taken which, if taken by the defendants in the present case, would have protected them against loss. If the law were held to be different from the result at which I have arrived, the consignee who had sold or dealt with goods to arrive, would only have to avail himself of his almost necessary earlier knowledge of the arrival of the goods to anticipate by production of his bill of lading any production by the indorsee of the original previously indorsed, and thus most seriously affect the transaction of any such dealings, which are effected solely in reliance upon the shipping documents.

The only remaining question is whether the defendants have been guilty of what is technically called a conversion, so as to

(1) Law Rep. 7 Q. B. 594.

entitle the plaintiffs to recover from them the value of the goods. The various cases cited in *Hollins* v. *Fowler* (1) were referred to by the defendants, for the purpose of contending that in the present case they had done no more than that which is ordinarily done by packers, carriers, wharfingers, warehousemen, and other bailees, who when they have merely carried the goods or dealt with them in the way of their trade, or re-delivered them to their bailors, consistently with the purposes for which they were bailed, have not been held liable for the value of the goods. But the facts in the present case are in no way analogous to those, for here the defendants have absolutely delivered the produce upon the orders of Cottam & Co. to third parties, purchasers, or others, intending to sell or use them for their own benefit. The defendants, therefore, have recognised a title, and assumed and executed a dominion over the goods utterly inconsistent with the plaintiffs' rights as proprietors, which are to take them wherever and when they please, and by this act of the defendants the plaintiffs have been permanently deprived of their property. That such acts entitle the plaintiffs to recover in this action the value of the property seems to me clear, and I therefore give a verdict and judgment for the plaintiffs for the amount which the parties have undertaken to fix.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Murray, Hutchins, & Stirling.*
Solicitors for defendants: *Freshfields & Williams.*

(1) Law Rep. 7 H. L. 757.

1880
Jan. 13.

RAINBOW AND WIFE *v.* JUGGINS.

Principal and Surety—Discharge of Surety by Laches of Creditor—Neglect to value Security in Bankruptcy.

The defendant was surety for the repayment of a sum of money advanced by the plaintiff to the principal debtor. As a further security for the advance, the principal debtor deposited with the plaintiff a policy of life insurance. The principal debtor subsequently became bankrupt, the advance remaining unpaid, and the plaintiff proved against his estate for the full amount of the advance without valuing the policy of life insurance as a security, which was in consequence claimed by the trustee in bankruptcy as part of the bankrupt's estate.

It was contended by the defendant in an action against him, as surety, that by not valuing the policy, and so depriving him of the benefit of it, the plaintiff had discharged him from all liability as surety:—

Held, by Manisty, J., that the omission to value the policy was at most a mere neglect or omission on the part of the plaintiff, and as such did not discharge the defendant from all liability as surety, but only to the extent of the value of the policy.

Wulff v. *Jay* (Law Rep. 7 Q. B. 756) followed.

Polak v. *Everitt* (1 Q. B. D. 669) distinguished.

ACTION upon a promissory note which had been signed by the defendant as surety to secure an advance made by the female plaintiff to one Pratt. The trial took place before Manisty, J., who reserved the case for further consideration. The facts and arguments sufficiently appear from the judgment.

Alfred Wills, Q.C., and *H. D. Greene*, for the plaintiffs.

Henry Matthews, Q.C., and *R. T. Reid*, for the defendant.

Cur. adv. vult.

Jan. 13. MANISTY, J. This is an action which was tried before me without a jury. It was brought by the plaintiffs to recover the amount of a joint and several promissory note, dated the 17th of February, 1876, signed by one John Pratt and the defendant, to secure the repayment to the plaintiff, Mary Ann Rainbow, on demand, of 400*l.* advanced and lent by her to Pratt, out of her separate estate, with interest at the rate of 5 per cent. per annum.

The defence set up by the defendant Juggins is that he was only a surety for Pratt, and that it was part of the arrangement

1880

RAINBOW v. JUGGINS.

whereby he became surety that Pratt should deposit with Mrs. Rainbow, as collateral surety for the debt, a policy of insurance for 250*l.*, on the life of Pratt, which had been effected by him on the 7th of November, 1866. That the policy was accordingly deposited by Pratt with Mrs. Rainbow, the annual premium being 7*l.* 8*s.* 4*d.*, payable half-yearly on the 2nd of May and the 2nd of November. That on the 18th of November, 1878, Pratt filed a petition in the Oxford county court for liquidation of his affairs by arrangement. That on the 7th of December, 1878, Mrs. Rainbow proved for 425*l.* 11*s.* 9*d.*, the full amount of principal and interest due upon the promissory note. That she voted against liquidation by arrangement, and the proceedings became abortive owing to the statutory number of creditors not voting for it. That on the 21st of December, 1878, Pratt was adjudicated bankrupt, the act of bankruptcy being his petition for liquidation, and all the proofs which had been made, including Mrs. Rainbow's, were, by order of the Court made on the 23rd of December, transferred into the Court of Bankruptcy. That Mrs. Rainbow in her proof mentioned the policy as one of the securities which she held for the debt, but did not put any value upon it, though her solicitor was warned by the defendant's solicitor that if she did not put a value upon it the effect would be, as he alleged, to release the defendant from his obligation as surety for the payment of the promissory note. That in March, 1879, the Court of Bankruptcy ordered the plaintiffs to give up the policy to the trustee in bankruptcy for the benefit of Pratt's creditors, no value having been put upon it, and Mrs. Rainbow having proved for the full amount of her debt. That the policy was given up to the trustee accordingly. And the defendant contends that, having thus lost the benefit of the policy, he has been damnified, and his position and rights as surety have been altered, and by reason of the premises, he submits that he is released from his obligation on the promissory note.

The plaintiffs by their reply denied that the defendant joined in the note as surety for Pratt. They also denied the alleged arrangement as to the deposit of the policy.

The plaintiffs further alleged by way of reply that the policy had lapsed, and was void and inoperative, on the 7th of December,

1880

RAINBOW v. JUGGINS.

1878, and in the alternative they alleged that the policy was not when the debt was proved, nor had it ever since been, of greater value than 32*l.*

I find, as facts, that the defendant did join in the note as surety for Pratt, and that the policy was deposited with the plaintiff, Mrs. Rainbow, as collateral security for the 400*l.* and interest.

The question which I have to decide is, whether under those circumstances, and upon the facts which I am about to state, the defendant has been discharged in point of law from his liability as surety, either in whole or in part.

The policy, as I have already stated, was for 250*l.* Pratt was under an agreement to execute an assignment of it to Mrs. Rainbow, and to pay the premiums as they accrued due. He never did execute an assignment, and he failed to pay the two half-yearly premiums of 3*l.* 14*s.* 2*d.* each, which became due on the 2nd of May, and the 2nd of November, 1878, in consequence of which the policy lapsed and became void at the expiration of thirty days from the 2nd of May, 1878—say on the 1st of June, 1878.

On the 4th of November, 1878, notice was given by the Oxford local agent of the insurance office to the plaintiffs' solicitor that the two premiums had not been paid, and communications took place between the plaintiffs' solicitors and the defendant's solicitors which resulted in the latter sending a cheque to the former on the 23rd of November, 1878, for 7*l.* 8*s.* 4*d.*, being the amount of the two premiums, accompanied by the following letter:—

"Dear Sir,—We hand herewith, as arranged, our cheque for 7*l.* 8*s.* 4*d.*, the amount of the premiums on Pratt's life policy now over due. In sending us a receipt be good enough to refer to the personal arrangement we verbally came to that on the payment off by Mr. Juggins of Mrs. Rainbow's claim upon him as Pratt's surety, this life policy would be handed over to him discharged from any claim thereon by your client. We hope early on Monday to see you with the promised 50*l.*

"We are, &c.,

"F. & G. Mallam.

"To W. Robinson, Esq."

1880

RAINBOW v. JUGGINS.

On the same day the plaintiffs' solicitor wrote to the defendant's solicitor as follows:—

"Nov. 23rd, 1878.

"Dear Sirs,—I have received your note and cheque for 7*l.* 8*s.* 4*d.*, in payment of the premiums due on life policy No. 8268, on life of John Pratt, in General Life Office, for 250*l.* When Mrs. Rainbow's claim on Mr. Juggins for 400*l.* and interest is discharged, this policy, if then in force, is to be handed over to Mr. Juggins.

"Yours,

"W. W. Robinson.

"To Messrs. F. & G. Mallam."

On the same 23rd of November, 1878, the plaintiffs' solicitor paid the Oxford local agent of the insurance company the amount of the two premiums (7*l.* 8*s.* 4*d.*), and obtained receipts for the same, but each receipt had a notice at the foot of it to the effect that if the premium mentioned in it had not been paid within thirty days from the day when it became due the receipt would be of no avail as the policy was cancelled.

At this time there was an arrangement that the defendant should pay the debt by instalments, but unfortunately it came to nothing, owing to the defendant's inability to pay down the first instalment of 50*l.*

It was not until the 15th of December, 1878, that the insurance office agreed to reinstate the policy, and in the meantime, namely, on the 7th of December, the meeting of Pratt's creditors was held under his petition for liquidation, and on that day Mrs. Rainbow proved, as already stated, for the whole amount due on the promissory note, stating in her proof that she held the policy as collateral security but not putting any value upon it. On the 23rd of December the proofs made on the 7th of December were, by order of the Court, transferred into the Court of Bankruptcy.

I am of opinion, and so decide, that assuming the defendant to have been discharged to the extent of the value of the policy when reinstated, which I think admits of considerable doubt, still he remains liable as surety for the residue of the debt. It is unnecessary to consider whether the defendant was discharged to the extent of the value of the policy because the plaintiffs' counsel,

188

RAINBOW v. JUGGINS.

wisely in my opinion, agreed to give credit for 32*l.*, which the defendant's counsel admitted was the full value of the policy after it was reinstated by the insurance office.

It was contended by the counsel for the defendant that Mrs. Rainbow having been warned as she was by the defendant's solicitor that if she did not put a value on the policy she would discharge the defendant from his liability, by not doing so wilfully gave up or abandoned the policy, and so discharged the defendant from all liability as surety. In support of that contention they cited *Polak* v. *Everett*. (1) In that case the complicated arrangement into which the parties had entered, and for the part performance of which the defendant had become surety, was substantially altered and varied without the defendant's consent. No doubt some dicta are to be found in the judgments of the judges in the Queen's Bench Division which seem in the abstract to be in favour of the defendant in the present case, but the ratio decidendi in *Polak* v. *Everett* (1) was that to which I have already adverted, and I do not think it is applicable to the present case. The Court of Appeal simply said they had no doubt that the view taken by the judges of the Queen's Bench Division was correct, and affirmed the judgment.

I think this case is at the most one of neglect or omission to put a value upon the policy, assuming it to have some value, when Mrs. Rainbow proved her debt, and that in accordance with several authorities, including *Wulff* v. *Jay* (2), the defendant was only discharged from his liability as surety to the extent of the value of the policy.

Assuming that Mrs. Rainbow was bound to put some value upon the policy, at what sum ought she to have assessed it? At the time when her proof was admitted the insurance office had not accepted the premiums, and the policy had lapsed. Suppose that Mrs. Rainbow had valued the chance of their reinstating it at a nominal, or very small sum, and proved for the balance, I take for granted that she could not then have been deemed guilty of any neglect or omission. At whatever sum she had valued the policy, in the event of its proving to be worth more, the trustee in bankruptcy would have been entitled to the excess: *Ex parte*

(1) 1 Q. B. D. 669. (2) Law Rep. 7 Q. B. 756.

King in re *Palethorpe* (1), so that in any view of the case it is difficult to see to what extent, if any, the defendant was damnified by Mrs. Rainbow not putting a value upon the policy. At all events the utmost extent to which in my opinion the defendant is entitled to relief is the agreed value of the policy after it was reinstated, say 32*l.*

I ought perhaps to notice an argument which was advanced by the defendant's counsel to the effect that the plaintiffs, by their solicitor, received the amount of the two premiums from the defendant upon the understanding mentioned in the letters of the 23rd of November, 1878, namely, that when the debt was paid the policy, if then in force, was to be handed over to the defendant. Assuming there was a binding agreement to that effect, I fail to see how it affects the present question. At most it would only have given the defendant a right of action for breach of the agreement, in the event of his having paid off the debt as arranged, and of his having kept the policy alive in the meantime.

I give judgment for the plaintiffs for 416*l.* 18*s.* 4*d.*, being 400*l.* and interest, less 32*l.*, with costs. The defendant will have the costs (if any) of the issues in fact which I have found for him.

Judgment accordingly.

Solicitors for plaintiffs: *Prior, Bigg, Church, & Adams, for W. W. Robinson, Oxford.*

Solicitor for defendant: *Charles Mallam, for T. & G. Mallam, Oxford.*

(1) Law Rep. 20 Eq. 273.

1879 MAPLESON *v.* MASINI.

Dec. 7.

Practice—Security for Costs—Foreigner residing without Jurisdiction—Defendant, how far liable to give Security — Counter-claim arising out of same Matters as Plaintiff's Claim.

11 QBD 466

In an action for breach of contract against the defendant, a foreigner residing abroad, he, by his defence, denied the breaches, and also made a counter-claim for breaches of the same contract by the plaintiff, claiming damages to an amount less than the plaintiff's claim :—

Held, that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter-claim.

MOTION by the defendant that an order of Lindley, J., in chambers—for the defendant to give security for the plaintiff's costs occasioned by the counter-claim to the satisfaction of one of the masters, unless the defendant within ten days should give particulars of his counter-claim, and an undertaking not to claim more damages than the plaintiff might recover—might be rescinded or varied.

It appeared upon affidavit that the action was for the defendant's refusal to perform an agreement between him and the plaintiff, whereby the defendant agreed for a salary to sing as first tenor in such theatres and concert rooms, &c., in Great Britain and Ireland as he might be employed by the plaintiff. The plaintiff claimed as damages 10,000*l*. By his defence the defendant, besides denying the breaches, alleged a breach of the agreement by the plaintiff in neglecting and refusing to employ the defendant as primo tenore assoluto as stipulated for in the contract, and requiring him to perform duties other than those stipulated for; and making the performance of such duties the condition of his being allowed to act under the contract. By way of counter-claim the defendant alleged that if any contract was entered into, as in the statement of claim alleged, the plaintiff committed a breach of it and wrongfully repudiated it by not employing the defendant in the way stipulated for; in assigning to him other duties than those stipulated for in the contract, and making the performance of such duties the condition of his being allowed to perform his duties under the contract, whereby the

defendant lost the benefit of the contract and suffered great loss and damages. The defendant claimed 1500*l.*

The order was applied for on the ground that the defendant resided abroad, beyond the jurisdiction of the Court.

Dec. 1. *Moulton*, in support of the motion. The order for the defendant to give security for costs is without precedent, and cannot be supported. Under the old Chancery practice if the defendant in a suit filed a cross-bill and thus became plaintiff, still if he was substantially defendant in the proceedings he was not required to give security; the principle being that this liability ought not to be imposed upon a defendant, who is not a volunteer: Daniel's Ch. Prac. 4th ed. vol. 2, p. 29. Where in a bill for sale or foreclosure under a mortgage the defendant admitted the debt, but filed a cross-bill alleging that the plaintiff was indebted to him, and that the security was obtained by fraud, and praying that the mortgage deed might be cancelled, and for an account and payment of what was due to him by the plaintiff, it was held that although out of the jurisdiction he need not give security: *Macgregor* v. *Shaw.* (1) *Winterfield* v. *Bradnum* (2), so far as it has any application is in the defendant's favour, as it shews that a defendant by setting up a counter-claim does not lose the character and is not deprived of the rights of a defendant, though the Court held that the defendant having counter-claimed in respect of a contract other than that sued upon by the plaintiffs, was not in a position to ask for security.

Chandos Leigh, in support of the order. So long as a counter-claim is only relied upon as matter of defence, the defendant cannot be treated as plaintiff and required to give security, but where it is in the nature of a separate action, the position of the defendant is reversed. Before the Judicature Act the defendant could only have enforced his counter-claim by cross action when he would have been bound to give security, and the privilege of setting up a counter-claim has not altered the practice in this respect. Order XIX., rule 3, enables a judge to refuse permission for a defendant to avail himself of a counter-claim if it cannot be conveniently disposed of in the action, and it ought not to be

(1) 2 De G. & Sm. 360. (2) 3 Q. B. D. 324.

1879

MAPLESON v. MASINI.

introduced for the purpose of disturbing the rights of the plaintiff. In *The Julia Fisher* (1), a case since the Judicature Act, an order was made which went further than the present one, compelling the defendant not merely to give security for the costs of his counter-claim but for the costs of the whole action. The old Chancery practice with respect to bills and cross-bills is inapplicable. A cross-bill was matter of right. A counter-claim is by the Judicature Act to take the place of a cross action. The present counter-claim is not a mere set-off, but claims unliquidated damages to an amount different from that claimed by the plaintiff, and therefore the proceedings cannot be regarded as one action. The distinction between a set-off and such a counter-claim has been recently recognised in *Neale* v. *Clarke* (2) and *Cole* v. *Firth*. (3)

Moulton, in reply. Admitting that the counter-claim is in the nature of a separate action, it is an action necessary for the defence of the defendant, and the order cannot be upheld.

Cur. adv. vult.

Dec. 7. The following judgments were delivered :—

FIELD, J. I think that the order of Lindley, J., must be set aside. The statement of defence and counter-claim are founded upon the same allegations, that the plaintiff insisted upon the defendant performing duties other than those stipulated for in the contract, and making the performance of such duties the condition of his being employed under the contract. It seems that Masini, the defendant, resides abroad, and on this ground the order was made that he should give security for the costs occasioned by his counter-claim. Now if he had been in the position of an ordinary defendant in an action for breach of contract there would have been no foundation whatever for the order. But it was urged that he was in the position of an actor in the proceedings, and that this was shewn by the fact that the damages claimed in his counter-claim are different from those claimed in the plaintiff's claim. I think it must be conceded that the mere position of the

(1) 2 P. D. 115. (2) 4 Ex. D. 286.
(3) 4 Ex. D. 301.

party on the record is not material on an application like the present one, such as for example, in interpleader proceedings, where the claimant is made a defendant. The substantial position of the parties must always be looked at. In the Equity cases which have been cited the proceedings were by bill and cross bill, and in those cases the Courts had always held before the Judicature Act that the defendant did not cease to be a defendant for the purpose of being required to find security, simply because he had tacked on to his cross-bill a claim for relief arising out of the same transaction as that to which the bill related. The case which at first seemed to me at variance with our present decision was *Winterfield* v. *Bradnum*. (1) There the defendant who admitted the claim, but counter-claimed to an amount exceeding the plaintiff's claim, called upon the plaintiffs to give security for costs. I, sitting in chambers, thought that he was entitled to do so. If the application had been before defence I think he would clearly have been entitled. If in his defence he had merely relied upon a set-off he would have had the same right. Now did it make any difference that the defendant did not merely defend himself, but asked for something which had no connection with the claim? I thought not, but my view was not assented to by the Court of Appeal, which held that the defendant being an actor or plaintiff in respect of his counter-claim was not entitled to ask the plaintiff for security for costs. If that case was in all respects similar to the present, we must of course be bound by it. But I think there are broad distinctions between the two cases. One is that the counter-claim arose out of a different transaction from that in respect of which the plaintiff was suing, whereas in the present case the plaintiff's and defendant's cases rest respectively upon the same circumstances, the contention merely being which version of those circumstances is the correct one. This being the case, I do not think the defendant ought to have been called upon to give security.

MANISTY, J. I am of the same opinion, upon the ground that the statement of claim and the counter-claim are in respect of one subject-matter of action. The plaintiff, an Englishman, sues the

(1) 3 Q. B. D. 324.

1879

MAPLESON v. MASINI.

defendant, a foreigner, for breach of contract. The defendant says that he was ready to perform the contract, but the plaintiff broke it, and he asks for damages by way of counter-claim for the plaintiff's breach. It appears that the damages claimed by the defendant are less in amount than those claimed by the plaintiff. But the amount of damages is merely incidental to the counter-claim. It is urged that the defendant ought to give security to the extent of the costs occasioned by the counter-claim, and Lindley, J., made an order accordingly. With the greatest respect to that learned judge, it seems to me an extraordinary result that, both claims arising out of the same transaction, if the defendant had claimed in his counter-claim an amount equal to the plaintiffs' claim he need give no security, but if he claims a different amount he must give security. This would be introducing a principle never before acted on either in courts of law or equity. The case seems to me to fall within the rule that prevailed with regard to bill and cross bill in equity, the object of the cross bill being that the whole subject-matter might be disposed of in one suit. What used to be done by cross bill is now done by counter-claim. The defendant, because in defending himself he incidentally asks for damages arising out of the same transaction, ought not to be called upon to give security for costs.

Order rescinded.

Solicitors for plaintiff: *J. & R. Gole.*
Solicitor for defendant: *F. E. Goodhart.*

THE BRITISH WAGGON COMPANY AND THE PARKGATE WAGGON COMPANY *v.* LEA & CO.

1880
Jan. 13.

Company—Voluntary Winding-up—Assignee of Company—Contract, how far Personal—Agreement to Repair—Companies Act, 1862, *ss.* 95, 131.

The plaintiffs, a waggon company, by agreement in writing let the defendants a number of railway waggons for a term of years at an annual rent, the agreement providing that the plaintiffs, their executors or administrators, should during the term keep the waggons in repair. Pending the agreement an order was made for the winding-up of the plaintiff company under the supervision of the Court, in pursuance of a resolution previously passed by the company, and liquidators were appointed, who joined the company in assigning the benefit of the contract to another company, upon the terms that such company should perform the stipulations by the assignors contained in the original contract. The assignees took over the repairing stations of the plaintiffs and the staff of workmen employed by them, and were always ready and willing to execute all necessary repairs to the waggons:—

Held, that the defendants had no defence to an action for rent, upon the ground that the plaintiffs had incapacitated themselves from performing their contract; for, first, the voluntary liquidation of the company was immaterial, the liquidators having power under the Companies Act, 1862, ss. 95, 131, to continue the letting of the waggons; and, secondly, the repair of the waggons by the company to whom the contract was assigned was a sufficient performance by the plaintiffs of their agreement to repair.

SPECIAL CASE, the material part of which is stated in the judgment of the Court.

Nov. 25. *A. Wills, Q.C.* (*Forbes* and *Lofthouse*, with him), for the plaintiffs, in addition to the cases mentioned in the judgment, referred to Lindley on Partnership, 4th ed. vol. 2, 1314.

A. L. Smith (*A. Kingdon*, with him), for the defendants.

A. Wills, Q.C., in reply.

Cur. adv. vult.

1880. Jan. 13. The judgment of the Court (Cockburn, C.J., and Manisty, J.) was delivered by

COCKBURN, C.J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway waggons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances:—

By an agreement in writing of the 10th of February, 1874, the

1880

BRITISH WAGGON CO. v. LEA.

Parkgate Waggon Company let to the defendants, who are coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of 600*l.* a year, payable by equal quarterly payments. By a second agreement of the 13th of June, 1874, the company in like manner let to the defendants fifty other waggons, at a yearly rent of 625*l.*, payable quarterly like the former.

Each of these agreements contained the following clause: "The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the waggons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On the 24th of October, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding-up of the company should be continued under the supervision of the Court.

By an indenture of the 1st of April, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had

previously been used by the Parkgate Company for the repair of the waggons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It is expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said waggons. This, however, they have done under a special agreement come to between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation, secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this Court, the use of the waggons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding-up, the company is by the effect of ss. 95 and 131 kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these waggons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however,

1880

BRITISH WAGGON CO. v. LEA.

was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the waggons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of *Robson* v. *Drummond* (1), approved of by this Court in *Humble* v. *Hunter*. (2) In *Robson* v. *Drummond* (1) a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held, that the defendant could not be sued on the contract—by Lord Tenterden on the ground that "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;" and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this *Boulton* v. *Jones* (3) is a sufficient authority. The case of *Robson* v. *Drummond* (1) comes nearer to the present case, but is, we think,

(1) 2 B. & Ad. 303. (2) 12 Q. B. 310.
(3) 2 H. & N. 564.

distinguishable from it. We entirely concur in the principle on which the decision in *Robson* v. *Drummond* (1) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in *Robson* v. *Drummond* (1) went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be

(1) 2 B. & Ad. 303.

1880

BRITISH WAGGON CO. v. LEA.

executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim Qui facit per alium facit per se applies.

In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in *Brice* v. *Bannister* (1) be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.

Solicitors for plaintiffs: *Bell, Brodrick, & Co.*
Solicitor for defendants: *Mark Shephard.*

(1) 3 Q. B. D. 569.

DE MORGAN, APPELLANT; THE METROPOLITAN BOARD OF WORKS, RESPONDENTS. 1880 *Feb.* 28.

Bye-law—Validity—Regulation for the preservation of Order on a Metropolitan Common—Public Meetings, Restriction on—Metropolitan Commons Act, 1866 (29 & 30 *Vict. c.* 122), *s.* 6.

By a scheme made under the Metropolitan Commons Act, 1866, and confirmed by the Metropolitan Commons Supplemental Act, 1877, it was provided that a common should be dedicated to the use and recreation of the public as an open and uninclosed space for ever, and the Metropolitan Board of Works were empowered to frame bye-laws and regulations for the prevention of nuisances and the preservation of order on the common. The Metropolitan Board of Works made a bye-law prohibiting the delivery of any public speech, lecture, sermon, or address of any kind, except with the written permission of the board first obtained, and upon such portions of the common and at such times as might be by such written permission directed and sanctioned by the board:—

Held, that such bye-law was valid.

No right on the part of the general public to hold meetings on a common is known to the law.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

The facts and arguments sufficiently appear from the judgment.

Feb. 25. The appellant appeared in person.

Biron, for the respondents.

Cur. adv. vult.

Feb. 28. The judgment of the Court (Lush and Manisty, JJ.) was delivered by

LUSH, J. This is a case stated by way of appeal against a conviction by a metropolitan police magistrate, whereby Mr. De Morgan was convicted in the penalty of 20*s.*, and 3*l.* 3*s.* for costs, for infringing a bye-law of the Metropolitan Board, made under the Metropolitan Commons Supplemental Act, 1877.

The bye-law in question is one of a series of bye-laws for the regulation and management of Clapham Common. It prohibits the "delivery of any public speech, lecture, sermon, or address of any kind or description whatever, except with the written permission of the board first obtained, and upon such portions of the common and at such times as may by such written permission be directed and sanctioned by the board."

1880

DE MORGAN v. METROPOLITAN BOARD OF WORKS.

The appellant admitted that he had delivered a sermon on the common without having obtained the permission of the board, but contended that the bye-law was ultra vires and void, and this is the question which is submitted for our decision.

As the common was purchased under the authority of Acts of Parliament, which we had not the opportunity during the argument to examine, we took time to consider our judgment.

The appropriation to public use of this and other commons within the metropolitan district was made under the authority of the Metropolitan Commons Act, 1866. By this Act the Inclosure Commissioners were prohibited from entertaining an application for the inclosure of a metropolitan common, and were authorized, on a memorial by the lord of the manor, or by the commoners, or the local authority, to prepare a scheme for the establishment of local management with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common, and to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order thereon. The scheme was to be laid before Parliament, and to have no operation until confirmed by Act of Parliament.

The scheme for Clapham Common, which was confirmed by the 40 & 41 Vict. c. cci. (Metropolitan Commons Supplemental Act, 1877), recommended the Metropolitan Board to carry into effect certain preliminary agreements, whereby the lords of the manor agreed to sell the fee simple of the common to the board, subject to all such rights of common, commonable rights, rights of way and water, as any person other than the conveying parties may have therein, and provided that after the completion of the purchase the common should be dedicated to and for the use and recreation of the public as an open and uninclosed space for ever, and should be regulated and managed by the board. The board were empowered to drain, plant, ornament, and improve the common as might be necessary, but no houses were to be erected thereon, except such lodge or other buildings as might be necessary for the maintenance or management of the common.

The power to make bye-laws is in these terms: "The board shall frame bye-laws and regulations for the prevention of nuisances, and the preservation of order on the common, and particularly

for preventing the deposit of rubbish on, and the illegal taking, cutting, felling, and sale of turf sods, bog-earth, gravel, sand, loam, clay, gorse, furze, fern, brushwood, trees, and the like from the common, and regulating the user of the common, or any part thereof, for the exercise of horses thereon, or for riding purposes, also for the regulation of bathing in the several ponds on the common." There is the usual proviso that "no bye-laws shall be repugnant to the laws of England, or the provisions of the scheme; and further that no bye-laws shall, as against any person entitled to any estate, interest, or right of a profitable or beneficial nature, in, over, or affecting the common, which shall not be purchased or acquired by the board, operate or be construed so as to take away or injuriously affect such estate, interest, or right."

In pursuance of the power thus conferred, the board framed and published a code of bye-laws which were duly confirmed by her Majesty's First Commissioner of Works, one of which bye-laws is the one in question.

The appellant who argued the case before us in person impeached the validity of the bye-law on two grounds: First, he contended that the public had acquired a right to hold meetings on the common prior to the passing of the Act, and that it was therefore repugnant to the scheme to put any restriction upon the exercise of that right.

The magistrate reports to us that some evidence was given of public meetings being held without remonstrance on the part of the commoners, or of the lords of the manor, though scarcely going back so long as twenty years; but finds that such user did not constitute a right or prove anything more than an excused or licensed trespass. In this opinion we entirely concur. The common was the soil of the lord of the manor, and the only rights over it were rights of pasture and other commonable rights of the commoners, and perhaps private rights of way. These are the rights which, not having been purchased by the board, are preserved. No such right as that claimed by the appellant on behalf of the public is known to the law. This ground of objection, therefore, entirely fails.

Secondly, he contended that the common having been "dedicated to and for the use and recreation of the public as an open and

1880

DE MORGAN v. METROPOLITAN BOARD OF WORKS.

uninclosed space for ever," the board could not prevent the public from assembling there whenever they pleased for the purpose of hearing sermons, or lectures, or addresses, on any subject, religious, political, or otherwise. If this argument were sound it would follow that any number of public meetings might be held at the same time in various parts of the common, even to the extent of monopolising the whole area, to the disturbance of the neighbourhood and the exclusion of that portion of the public who desired to use it for the purpose of recreation. We are satisfied that such was not the intention of the scheme which Parliament has sanctioned. Its object was to secure in perpetuity the common as a place which the public might use as of right for the purpose of recreation, and in order that all classes may at all times share in its enjoyment, the user of the common is necessarily placed under regulations. Bye-laws are a code of restrictions. Modes of user which, if enjoyed without limitation as to time or place, would unduly interfere with the comfort and enjoyment of others, such as riding, boating, cricketing, bathing, and the like, are put under reasonable restrictions. It is equally necessary that the holding of public meetings on the common should be also put under regulation. And what can be a more reasonable mode of regulating such meetings, than to require information beforehand what the object and character of the meeting are, in order that the board may be able to judge whether it is such as ought to be allowed on the common, and if so to prescribe reasonable limits as to time and place? Mr. De Morgan contends that order may be sufficiently preserved by the arrest and punishment of persons who by becoming riotous, or committing a breach of the peace violate the law. These, however, are retributive measures which operate only indirectly; whereas the Act contemplates and requires precautionary and preventive measures, tending directly to secure the comfortable enjoyment of the common by all classes.

We are therefore of opinion that the bye-law is valid, and consequently the conviction must be affirmed with costs.

Conviction affirmed.

Solicitors for respondents: *Solicitors to the Metropolitan Board of Works.*

GILL *v.* DICKINSON.

1880
Feb. 20.

Mines and Minerals—Right to let down Surface without making Compensation —Custom—Inclosure Act.

To a statement of claim for working mines under the plaintiff's land without leaving sufficient support for the surface, the defendant pleaded in his statement of defence that he was the lessee of the mines from the lord of the manor; that the plaintiff's land had, previously to the passing of an Inclosure Act under which the waste of the manor was inclosed and allotted, formed part of such waste; that the lord of the manor from time immemorial had been accustomed to work the mines under the waste without leaving sufficient support for the surface, and without making any compensation for injury so caused; that by the Inclosure Act it was provided that the lord of the manor, his successors or assigns, might hold all mines and quarries lying under the waste together with liberty of searching for, winning, and working the same as fully and freely as he or they might have had and enjoyed the same in case the Act had not been passed, and that without making or paying any satisfaction for so doing; and that it was further provided by the Act that compensation for damage caused to any person's allotment by such working of the mines should be assessed by a justice of the peace, and should, when so assessed, be paid by the occupiers of the other allotments in the same township:—

Held, that the statement of defence was good, on the ground that, whether any valid custom such as alleged in the statement of defence existed previously to the Act or not, the Act expressly gave to the lord of the manor and his assigns the right to let down the surface by mining without making any compensation.

Beckett v. *Bradley* (31 L. J. (Q.B.) 65) not followed.

STATEMENT OF CLAIM complained that the defendant wrongfully worked certain coal mines under the plaintiff's land without leaving proper or sufficient support for the said land of the plaintiff.

Statement of defence alleged as follows, viz., that the plaintiff's land was situated in the manor of Wolsingham, and until the passing of a certain Inclosure Act of the 31st year of George 2, formed part of the waste of the manor, and that the Bishop of Durham, in right of his see, was lord of the manor, and entitled to the soil of the waste and the mines thereunder, certain other persons being entitled to a right of common upon the waste. It further alleged that from time immemorial up to the passing of the Inclosure Act the bishop had been accustomed to work the mines without paying any satisfaction for injury caused by such working, and that since the Act he had continued to work the

1880

GILL v. DICKINSON.

mines in the same manner. It was further alleged that the waste of the manor was inclosed and allotted by an award made under the Inclosure Act, which Act provided as follows, viz., that the Lord Bishop of Durham, his successors and assigns, should and might from time to time, and at all times thereafter, have, hold, and enjoy all mines and quarries lying under the waste, together with liberty of searching for, winning, and working the said mines and quarries as fully and freely as he or they might or could have had and enjoyed the same in case the Act had not been made, and that without making or paying any satisfaction for so doing. It was further provided that if any person or persons should suffer damage in his, her, or their allotment by the searching for, winning, and working of the mines and quarries, compensation might be assessed by a justice of the peace, and such compensation should be paid and borne by the occupiers of the several other allotments in the same township in which the allotment damaged should be situated. It was further alleged that the defendant was the lessee of mines under the plaintiff's land from the lord of the manor, and that the trespasses complained of were done in pursuance of the powers of working mines under the waste reserved to the lord of the manor, his successors, and assigns by the Inclosure Act. (1)

Demurrer.

Gainsford Bruce, for the plaintiff, supported the demurrer. The decision in the case of *Blackett* v. *Bradley* (2) is directly in point. The very same Inclosure Act was there discussed, and a plea precisely similar to the statement of defence in this case was held bad on the ground that the alleged custom was bad. [He also cited *Hilton* v. *Earl Granville*. (3)]

[MANISTY, J., referred to *Aspden* v. *Seddon* (4) and *Hext* v. *Gill*. (5)]

(1) It has been thought sufficient to give only the substance of the material provisions of the Inclosure Act, inasmuch as the provisions of the same Inclosure Act are very fully set out in the case of *Blackett* v. *Bradley*, 31 L. J. (Q.B.) 65, and the main reason for reporting this case is that it practically reverses the decision in the former case.

(2) 31 L. J. (Q.B.) 65.

(3) 5 Q. B. 701.

(4) Law Rep. 10 Ch. 394.

(5) Law Rep. 7 Ch. 699.

1880

GILL v. DICKINSON.

Herschell, Q.C., for the defendant. The decision in *Blackett* v. *Bradley* (1) seems to have proceeded on the assumption that that case was undistinguishable from *Hilton* v. *Earl Granville*. (2) It was expressly admitted by the defendant's counsel that this was so. It is contended that this was a mistaken view. The distinction was not pointed out between an alleged custom to mine without leaving support for the surface in respect of all the tenements of the manor and a custom of the same description confined only to the waste of the manor. The former custom might be bad as being unreasonable, but it does not follow that a custom to mine under the waste without leaving support would be bad. If such a custom could have a legal origin, a legal origin ought to be presumed. Such a custom might be created by express agreement. Whatever right the lord might have by agreement or reservation he can have by custom. It follows that the decision in *Hilton* v. *Earl Granville* (2) did not govern the case of *Blackett* v. *Bradley* (1), and that case cannot be regarded as a binding authority. *Hilton* v. *Earl Granville* (2) itself cannot be considered good law since *Rowbotham* v. *Wilson*. (3) Again, whether such a right as claimed by the lord of the manor could independently of the Inclosure Act have been good, the provisions of the Inclosure Act expressly give the lord this right. No reference seems to have been made to the terms of the Inclosure Act in the case of *Blackett* v. *Bradley*. (1)

Gainsford Bruce, in reply. The provisions of the Inclosure Act only aim at the reservation of existing rights. It never was intended to create such a right if it did not previously exist.

LUSH, J. If I could see that the attention of the Court had been directed in the case of *Blackett* v. *Bradley* (1) to the distinction between that case and *Hilton* v. *Earl Granville* (2), and to the provisions of the Inclosure Act, I should feel myself bound to follow the decision in that case. But it is clear that the Court proceeded on the admission that the decision in *Hilton* v. *Earl Granville* (2) did govern the case, and moreover the attention of the Court does not seem to have been called to the

(1) 31 L. J. (Q.B.) 65. (2) 5 Q. B. 701.
(3) 8 H. L. C. 348.

1880

GILL v. DICKINSON.

effect of the words of the Inclosure Act expressly giving the lord the right to let down the surface without making compensation. It appears to me that, whether well founded originally or not, this right is expressly legalized by the Act. The allottees take their allotments subject to the conditions imposed by the Act, and among them to the condition that the lord of the manor may work the mines without leaving sufficient support, and without making compensation. Furthermore, the Act expressly provides for compensation from a different source, namely, from contributions to be levied upon the other allotments in the same township. Under these circumstances I do not feel myself bound by *Blackett* v. *Bradley* (1), and it seems to me that this statement of defence is good upon the correct construction of the Inclosure Act.

MANISTY, J. I am of the same opinion, and for the same reasons. Lawfully or unlawfully, the lord of the manor had from time immemorial worked the mines without leaving support, and without making compensation. Thereupon by the Inclosure Act a parliamentary contract is made. It is in my opinion just as if the same provision had been contained in a deed made between the lord and all the tenants of the manor. The bargain is that if certain waste lands are inclosed and allotted, the lord shall have the right of mining as he had theretofore done under such lands without leaving support and without making compensation. No doubt if the words were ambiguous the presumption would be against the existence of such a right without compensation, but when you find that there is an express provision that the lord shall not be liable to make compensation, and for compensation from another source, there appears no longer any room for doubt as to the meaning of the Act. I think for these reasons our judgment should be for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Gregory, Rowcliffe, & Co., for Robinson.*

Solicitors for defendant: *Ridsdale, Craddock, & Ridsdale, for Watsons.*

(1) 31 L. J. (Q.B.) 65.

CAPPER AND CO. *v.* WALLACE BROTHERS.

1880
Feb. 24.

Ship—Charterparty—Place of Discharge—"So near thereto as she may safely get."

By the terms of a charterparty the ship was to take in a full cargo at Bombay, and proceed therewith to a safe port on the continent between Havre and Hamburg as ordered, "or so near thereto as she might safely get." The cargo was to be brought to and taken from alongside at merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder in Holland. Koogerpolder is some distance up a canal, and the vessel with her full cargo on board drew too much water to proceed up the canal. No arrangements had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The portion of the cargo that required to be unloaded in order to enable the vessel to enter the canal was at least a third. The question arising under these circumstances between the shipowners and the charterers which of them ought to bear the expenses of lightering the cargo from the mouth of the canal to Koogerpolder:—

Held, that, under the circumstances, the voyage under the charterparty ended at the mouth of the canal, and that consequently the charterers ought to bear the above-mentioned expenses.

Meaning of the words "as near thereto as she may safely get" discussed.

SPECIAL CASE.

The action was brought by shipowners against charterers to recover certain expenses incurred in the carriage of cargo from Nieuwediep, at the mouth of the North Holland Canal, to Koogerpolder.

The facts sufficiently appear from the judgment.

Feb. 20. *Herschell, Q.C.* (*A. L. Smith*, with him), for the plaintiffs. The question intended to be raised is on whom the expense of taking on the cargo to Koogerpolder ought to fall. This depends on whether the voyage came to an end at the mouth of the canal or not. The meaning of the charterparty is that the ship is to get as near to the port of discharge as she can safely get as a loaded vessel: *Nelson* v. *Dahl* (1); *Shield* v. *Wilkins*. (2)

The claim is for 184*l.*, which represents the expense of lightering part of the cargo and taking the ship on with the residue to

(1) 12 Ch. D. 568. (2) 5 Ex. 204; 19 L. J. (Ex.) 238.

1880

CAPPER v. WALLACE.

Koogerpolder. It is found that it would have cost only 167*l.* to have lightered the whole cargo to Koogerpolder. It is not contended that the shipowners can be entitled to more than the latter sum.

Butt, Q.C. (*Arbuthnot*, with him), for the defendants. The captain signed bills of lading making the goods deliverable at Koogerpolder.

[LUSH, J. It cannot have been intended by the bills of lading to extend the shipowners' liability in this respect beyond that imposed by the charterparty.]

The bills of lading at any rate throw light on the meaning of the words "as near thereto as she can safely get." It is contended that the meaning of the words cannot be "as near as she can get as a fully loaded vessel." Supposing that by taking out a small proportion of cargo the vessel could get to the port, she would clearly be bound to go there. It is a question of what is reasonable. It is contended that as by lightering a portion of the cargo the vessel could get to Koogerpolder, she was bound to go there, and that the shipowner could not treat the voyage as at an end at Nieuwediep. The Court of Session in Scotland has decided a similar case in accordance with the defendants' contention: *Hillstrom* v. *Gibson.* (1) [He also cited *Shand* v. *Sanderson.* (2)]

Herschell, Q.C., in reply cited *Burgon* v. *Sharpe.* (3)

Cur. adv. vult.

Feb. 24. The judgment of the Court (Lush and Manisty, JJ.) was delivered by

LUSH, J. This is an action for the cost of lightering a cargo from Nieuwediep, through the North Holland Canal, to the port of Koogerpolder, which is situated at the extremity of the canal and about thirty miles from its mouth.

By a charterparty between the plaintiffs, as owners of the vessel, and the defendants, it was agreed that the vessel should take in at Bombay a full cargo of merchandize and proceed therewith to a safe port in the United Kingdom or on the continent, between Havre and Hamburg, as ordered on signing bills of

(1) 8 Scotch Sess. Cas, 3rd series, 463. (2) 4 H. & N. 381.
(3) 2 Camp. 529.

lading, "or so near thereto as she may safely get" and deliver the cargo on payment of a specified tonnage freight.

The only other material terms were that the cargo was to be brought to and taken from alongside at merchant's risk and expense, and that the master was to sign bills of lading as presented, without prejudice to the charterparty, at rates not less than those current at the port of loading.

The ship was ordered to Koogerpolder, in Holland, and the master signed bills of lading, which stated that the cargo was to be delivered at the port of Koogerpolder.

A marginal note stated the rate of freight, and to it were added the words "and all other conditions as per charterparty."

The vessel drew 19 ft. 6 in. of water, being about 4 ft. deeper than the canal; consequently, she could not get nearer to Koogerpolder than Nieuwediep without discharging a considerable part of her cargo.

Before the arrival of the vessel, the plaintiffs had opened a correspondence with the defendants with a view to ascertaining what course they proposed to adopt on the arrival of the vessel as near to Koogerpolder as she could safely get, stating what her draft was and what was the capacity of the canal.

The defendants having sold the cargo afloat refused to interfere, contending that by the bills of lading the owners had admitted Koogerpolder to be a safe port, and had undertaken to carry the cargo there.

The master had, therefore, no alternative on arriving at Nieuwediep, but either to lighter the whole of the cargo to the port of Koogerpolder, or to discharge into lighters a sufficient portion to enable the ship to proceed there with the residue. He adopted the latter alternative, and procured lighters in which he discharged 573½ tons, and thereby reduced the draught to 15 ft. 8 in., and having lightered that portion of the cargo to Koogerpolder and discharged twenty of the crew, he had the vessel towed through the canal, and discharged the residue of the cargo at the port.

The plaintiffs claimed the pilotage, harbour dues, and other expenses of going into port as well as demurrage, but on the argument they consented to accept what it would have cost to

1880

CAPPER v. WALLACE.

lighter the whole, and this was agreed at 167*l*. The defendants paid into court sufficient to cover the lighterage of the 573½ tons, but denied their liability to the residue of the claim.

We are of opinion that the bills of lading have not the effect of altering the contract, so as to bind the owners as against the charterers to deliver at the port of Koogerpolder. The master had no authority so to alter the contract even if he had intended to do so, but we are satisfied that such was not his intention, but he signed the bills of lading in the form presented to him in compliance with and in order to carry out the terms of the charterparty. The only effect which can be given to the bills of lading as between the parties is to preclude the plaintiffs from objecting that Koogerpolder was not a safe port, and to bind the plaintiffs to the same extent as and no further than if Koogerpolder had been named in the charterparty as the port of discharge.

It cannot, we think, be laid down as an inflexible rule that when a ship has got as near to the port as she can get, and the only impediment to proceeding further is overdraught, the master is under all circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words "as near thereto as she can safely get," must receive a reasonable and not a literal application. The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such a case if the consignee is at hand to receive the surplus cargo and so relieve the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom* v. *Gibson*. (1) In that case, the master, who was bound to Glasgow, was unable to proceed beyond a point near Greenock with his full cargo on board. The consignee being at hand requested him to discharge what was necessary to lighten the ship and to proceed with the residue. The majority of the Court held this to be a reasonable request under the circumstances. The master complied with the request,

(1) 8 Scotch Sess. Cas. 3rd series, 463.

1880

CAPPER v. WALLACE.

and it was held that his going on to Glasgow was in the course of his duty, and that he could not claim demurrage for the time taken in reaching the port.

In this case the circumstances are essentially different. We are not informed what the actual tonnage was, but the registered tonnage is stated to have been 1090 tons, and 573½ tons, which was at least one-third, had to be taken out before the draught could be sufficiently reduced to enable the ship to pass through the canal in safety. Moreover, the consignee was not at hand to receive. The charterers had refused to make any arrangement, and no one appeared to take delivery. Under these circumstances, we are of opinion that the master was justified in considering the voyage at an end, and in treating the mouth of the canal where he was anchored as the place of discharge. We, therefore, adjudge the plaintiffs to be entitled to 102*l.*, being the balance after deducting the sum paid into court, and give judgment for that sum and costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Ingledew, Ince, & Co.*
Solicitors for defendants: *Johnsons, Upton, & Co.*

CHAPMAN *v.* THE MIDLAND RAILWAY COMPANY.

Feb. 23.

Practice—Costs on higher Scale—Rules of the Supreme Court (Costs), Order VI., rule 2—Injunction when Principal Relief sought.

In an action for trespass to land, the plaintiff claimed and ultimately obtained an injunction in addition to damages for the trespass. It did not appear that the nature of the trespass complained of involved any assertion of title or any injury of a permanent or irreparable character. The plaintiff claimed costs on the higher scale, under Rules of Supreme Court (Costs), Order VI., rule 2:—

Held, that this was not such an action for an injunction as to render the higher scale applicable within the rule.

Appeal from the decision of Field, J., at chambers, refusing an application for a review of taxation.

The facts were as follows: The writ, which was issued on the 29th of May, 1877, claimed damages for wrongfully entering the

1880

CHAPMAN v. MIDLAND RAILWAY CO.

plaintiff's land, and digging up the surface, and spoiling the grass, and pulling down the fences, and depositing materials on plaintiff's land, and an injunction. The statement of claim complained that the defendants, by their contractors, agents, and servants, unlawfully entered upon the plaintiff's land with horses and carriages, and cut up the surface, and spoiled the grass, and pulled down the fences thereon, and used and broke up the plaintiff's road over the same, and deposited materials on the plaintiff's land. The plaintiff claimed 30*l.* damages, and an injunction.

By way of defence the defendants brought 10*l.* into court. The plaintiff denied that that amount was sufficient to satisfy his claim. The trespasses complained of being continued pending the action, the plaintiff applied in the Long Vacation of 1877 to the vacation judge and obtained for an injunction to restrain the defendants from further trespassing on the land in question. In November, 1877, an order was applied for at chambers, and obtained by the defendants, to stay all further proceedings in the action on payment of a further sum of 20*l.* into court, and the costs of the action. It appeared that the nature of the trespasses complained of was substantially as follows: The contractors employed by the defendants for the purposes of certain works had, while the works were being constructed, wrongfully made use of an occupation road, and a small portion of the land adjoining thereto, which formed part of a field belonging to the plaintiff, for the purpose of access by their carts from a public highway to the works, and otherwise for the purposes of the works. A certain amount of damage had been caused by this use of the occupation road to the land, but not of a permanent or irreparable nature. The plaintiff claimed, on taxation, to be entitled to costs on the higher scale, on account of the action being for an injunction, under Rules of the Supreme Court (Costs), Order VI., rule 2. The Master had refused to tax on the higher scale, and Field, J., on appeal to him at chambers, had refused to order him to review his taxation.

Wills, Q.C., and *R. S. Wright*, for the plaintiff, moved to rescind the order of Field, J. It is contended that the injunction here was the principal relief sought, and that therefore the costs ought to have been taxed on the higher scale. Damages could only

compensate for injury done up to the date of the writ. The injunction put an end to trespasses that might have continued for a long time; in fact, until the works were completed, whenever that might be. The mere claim of an injunction in the first instance no doubt would not be the test, but when the action does not stop the trespass, as in the present case, but the same is continued, and it ultimately becomes necessary to procure an injunction, the injunction is the principal relief obtained. The case is of considerable importance, for it is understood that there is a difference in the practice of the Divisions in the matter, and that in the Exchequer Division costs are taxed on the higher scale where an injunction is obtained in the action. [They cited *Flower* v. *Local Board of Low Leyton* (1).]

W. G. Harrison, *Q.C.*, and *Sutton*, for the defendants, were not called upon to shew cause.

LUSH, J. I am sorry that there should be any difference in the practice of the Divisions in this respect, and I hope that this question may be settled by the Court of Appeal. We are bound, however, to put our own construction on this rule. The fact that there is a claim for damages does not disentitle the party to costs on the higher scale if the action is for an injunction within the rule, but one cannot read the enumeration of the particular cases to which the rule applies without seeing that it does not apply to trespasses of this nature. The act of trespass here complained of is merely the unauthorized user of an occupation road. It was not committed in the assertion of any right, or with any intention of permanently trespassing. It was done for convenience' sake while the works were proceeding. No permanent irreparable injury was involved. I do not think that this is the kind of case aimed at by the words of the rule. The words are: "In all actions for special injunctions to restrain waste, nuisances, breaches of covenant, injuries to property and infringement of rights, easements patents and copyright, and other similar cases when the procuring such injunction is the principal relief sought to be obtained." All the particular instances of special injunctions mentioned are, it seems to me, cases where title is involved, or the injury would be

(1) 5 Ch. D. 347.

1880

CHAPMAN v. MIDLAND RAILWAY CO.

of an irreparable character, and the amount of damage could not be estimated. It is clear to me that the rule intends to distinguish between two classes of injunctions, and this is not one of the class to which the higher scale was intended to apply. For these reasons I think that the decision of Field, J., was right, and this application must be refused.

MANISTY, J. I am of the same opinion. All the words following the word "injunctions" might be omitted from the rule if the plaintiff's contention be correct. It is not all cases of special injunctions that are within the rule. It is only in a specified class of cases, and others similar to them, where the injunction is the principal relief claimed, that the higher scale of costs is to apply. It was never meant that it should apply whenever the action was for an injunction.

Application refused.

Solicitors for plaintiff: *Lousada & Emanuel.*
Solicitors for defendants: *Beale, Marigold, & Co.*

Feb. 20.

MULLINS *v.* THE TREASURER OF THE COUNTY OF SURREY.

Prisons Act, 1877 (40 & 41 *Vict. c.* 21) *ss.* 4, 57—*Prisoner—Expenses of Conveying to Prison.*

An order was made under 27 Geo. 2, c. 3, by a metropolitan police magistrate upon a county treasurer for the payment to a police constable of the expenses of the conveyance from the police court to prison of a person sentenced to imprisonment on summary conviction. A similar order was made in respect of the expenses of the conveyance from the police court to prison of a person committed for trial for felony. The county treasurer refused to comply with the orders, on the ground that the liability to these expenses had been transferred by the Prisons Act, 1877, from the county treasurer to the Secretary of State:—

Held, that the provisions of the Prisons Act, 1877, included only the expenses of prisoners subsequent to their reception in the prison, and consequently that they did not affect the liability of the county treasurer to pay the expenses ordered to be paid as above mentioned.

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SPECIAL CASE, of which the facts were in substance as follows:—

The plaintiff was a metropolitan police constable. On the 12th

of August, 1879, a woman was convicted by a police magistrate sitting at Lambeth of being drunk and disorderly, and using obscene language, and was adjudged to be imprisoned for fourteen days in her Majesty's prison at Westminster, in the county of Middlesex. The magistrate, in the usual course, made out the warrant for her commitment addressed to the plaintiff, commanding him to convey her to the said prison. The plaintiff did accordingly convey her from the police court to the prison. The prisoner had no means of bearing the charges of being so conveyed to prison. The magistrate afterwards ascertained the sum which ought to be paid to the plaintiff in respect of such charges to be one shilling and sixpence, and made an order under 27 Geo. 2, c. 3, directed to the defendant as the treasurer of the county of Surrey, ordering him to pay to the plaintiff as such constable the sum of one shilling and sixpence. The defendant refused to comply with the order, on the ground that the liability had been transferred from him to the Secretary of State by the Prisons Act, 1877 (40 & 41 Vict. c. 21). A similar question also arose with regard to another sum of one shilling and sixpence ordered to be paid by defendant to plaintiff, which sum represented the expenses incurred in conveying from the police court to the prison a man committed by the magistrate sitting at Lambeth to the Clerkenwell prison in the county of Middlesex, to take his trial for felony committed in the county of Surrey. This sum also the defendant refused to pay on the same ground as above mentioned.

The question for the Court was whether the liability to pay these expenses had been transferred by the Prisons Act to the Secretary of State.

Sir H. Giffard, S.G. (*Avory*, with him), for the plaintiff. These expenses were, by 27 Geo. 2, c. 3, thrown upon the county rate. But they never were paid by the prison authority. Previously to the passing of the Prisons Act, 1877, the justices at quarter sessions were the prison authority, but they had nothing to do with the payment of these expenses in the character of prison authority. It is only charges payable by the prison authority that are intended to be transferred to the Secretary of State under the Prisons Act, 1877. The question turns on the 4th

1880

MULLINS v. TREASURER OF SURREY.

and 57th sections. By the former section, "The expenses incurred in respect of the maintenance of prisons and of the prisoners therein, are to be defrayed out of moneys provided by Parliament." By s. 57, "the maintenance of a prisoner" includes "all such necessary expenses for food, clothing, &c., from the period of his committal to prison until his death or discharge from prison as would, if this Act had not been passed, have been payable by a prison authority." It is contended that committal to prison means lodgment within the prison of the prisoner's body. Till the prisoner is in the prison he is not under the jurisdiction of a prison authority at all.

Herschell, Q.C. (*E. Clarke*, with him), for the defendant. The Prisons Act, 1877, has made a fundamental change in the prison system of the country. Before that Act each county had its own prison for its own use, and the conveyance of any prisoner committed within the county would necessarily be to its own prison. Now the Secretary of State has power to make arrangements of an altogether different kind, as he may think expedient, with regard to the use of prisons, so that prisoners committed in one county may be sent to the gaol of another county. The expenses of the conveyance of prisoners to prison are now, therefore, of a different character from the expenses before the Act. It is reasonable, under these circumstances, that they should be transferred from the local rate and borne by the state. It is contended that the words "committal to prison" in s. 57 mean the signing of the warrant for the commitment by the magistrate. The section does not say, "from the period of the prisoner's being received in the prison." These expenses were substantially paid by the prison authority before the Prison Act, 1877. They were paid by the county treasurer as the servant of the justices who were the prison authority. The proviso to the 57th section clearly shews that the defendant's contention is correct. It provides that "nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not been passed." Unless the section refers to these expenses, what need could there be of such a proviso?

Sir H. Giffard, S.G., in reply. The proviso was probably

inserted ex majori cautelâ, under the idea that the provisions of the Act might possibly, but for such a proviso, exempt a prisoner from some expenses, but without any very distinct intention.

LUSH, J. The case does not appear to me free from difficulty, but on the whole I am of opinion that the plaintiff is entitled to judgment. Under 27 Geo. 2, c. 3, an officer carrying a person to prison was entitled to be paid the expenses of such conveyance out of the moneys of the prisoner, or if the prisoner had no means of paying such expenses, then they were to be paid by the county treasurer upon an order for the purpose made by the magistrate. By Jervis's Act (11 & 12 Vict. c. 42), s. 26, an officer carrying a prisoner committed for trial to prison was entitled to be paid the expenses of so carrying him by the treasurer of the county in all counties but Middlesex, and in Middlesex by the overseers of the poor upon an order of a magistrate to that effect. The question is whether there is anything in the Prisons Act, 1877, that alters the law in that respect. I find it impossible to give an entirely satisfactory construction to the provisions of that Act, because the conclusion at which I arrive makes the proviso to the 57th section useless and meaningless. When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso. Nevertheless, on carefully analysing the words of the Act, I cannot find any provision that can be fairly said to include these expenses. The definition of a prisoner in s. 57 is a "person committed to prison." What, then, is the meaning of "committed?" I think it is clear, looking to the words of the 4th section, which throws the maintenance of prisons and of the "prisoners therein" on the Secretary of State, that "committed," must mean actually in the prison. The 57th section proceeds to declare that the "maintenance of a prisoner" includes all such necessary expenses incurred in respect of a prisoner, &c., as would if this Act had not been passed have been payable by a prison authority. As the law stood before the Act the justices in quarter sessions were the prison authority, and all sums required for the maintenance of prisoners were paid by their order. The Act says that all such expenses from the period of the prisoner's committal,

1880

MULLINS v. TREASURER OF SURREY.

which I have already said, in my opinion, means the period of his reception into the prison until his discharge or death, shall be defrayed out of moneys provided by parliament. The language would be plain enough but for the proviso. There is not a word in the section, which but for the proviso, could fairly be construed to include the expense of carrying a prisoner to prison. The result is, in my opinion, that we must reject the proviso altogether. This is not an entirely satisfactory construction, but it seems to me that we must either reject the proviso or strain the words of the enacting part of the section beyond their fair meaning.

MANISTY, J. I am of the same opinion. I found my judgment principally on the words, "as would if this Act had not been passed have been payable by a prison authority." The defendant's counsel suggests that before the Act these expenses might be considered as paid by the county treasurer, as representing the justices who were the prison authority. But on looking at the provisions of 11 & 12 Vict. c. 42, s. 26, it is clear that that cannot be so. By that section in the case of the county of Middlesex the expenses of the conveyance of prisoners committed for trial to prison were to be paid by the overseers of the parish in which the offence was committed; in the case of other counties the county treasurer was to pay them. This seems to me quite inconsistent with the idea that they were paid by the county treasurer as representing the prison authority. It seems to me perfectly plain that but for the proviso to the 57th section of the Prisons Act, 1877, the only expenses intended to be dealt with were those subsequent to the reception of the prisoner in the prison. I think we must reject the proviso. This is no doubt a strong thing to do, but it constitutes the only difficulty which I feel in the case.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hare & Fell, for Solicitor to the Treasury.*
Solicitor for defendant: *Smallpiece.*

Distinguished. CORKERY *v.* CARPENTER [1951] 1 K. B. 102

WILLIAMS AND ANOTHER, APPELLANTS; ELLIS, RESPONDENT. 1880 *Feb.* 19.

Highway—Turnpike—Bicycle—Liability to Toll.

A Local Turnpike Act, 3 Wm. 4, c. lv., imposed the following tolls:—

For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-à-vis, phæton, curricle, &c., 6*d.*

For every carriage of whatever description, and for whatever purpose, which shall be drawn or impelled, or set or kept in motion by steam or other power or agency, than being drawn by any horse or horses, or other beast or beasts of draught, 5*s.*:—

Held, that a bicycle was not a carriage liable to toll under the Act.

CASE stated by justices for Gloucester under 20 & 21 Vict. c. 43.

The appellants appeared upon an information charging that they being collectors of tolls at a turnpike gate, called Over Gate, unlawfully demanded and took from the respondent 5*s.*, as and for the toll of a bicycle on which he was riding, the respondent being exempt from the payment of such toll by reason of such bicycle not being a carriage in respect of which toll was authorized to be demanded, &c. The appellants were convicted and fined 2*s.* 6*d.*, with costs.

It was proved on the part of the informant that on the 12th of August, 1879, he rode and propelled a bicycle through the toll-gate kept by the defendants without any demand for toll being made; that afterwards on the same day he again rode and propelled a bicycle through the same gate, and that the defendant, E. Williams, then demanded of him the sum of 2*d.*, which he refused to pay, and went on through the gate; that the defendant, J. Williams, then ran after him and demanded of him the sum of 5*s.* as the toll for the bicycle which he also refused to pay; that J. Williams then distrained the bicycle and detained it until payment of the 5*s.*, under protest.

It was admitted that (subject to the General Turnpike Acts) the tolls to be taken at the turnpike gate were prescribed by 3 Wm. 4, c. lv., and that the tolls were collected by the appellants under that Act; and that by virtue of s. 6 of the Act, and the list of tolls set up at the turnpike gate by the trustees in pursuance

1880

WILLIAMS v. ELLIS.

thereof, the appellants were entitled to take the following tolls, which were set out on the toll-board exhibited at the toll-gate, viz.:—

"For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-à-vis, barouche, phæton, curricle, calash, chaise, chair, gig, whiskey, caravan, hearse, litter, or other such carriage, the sum of 6*d.*

"For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2*d.*; and

"For every carriage of whatever description, and for whatever purpose, which should be drawn or impelled, or set or kept in motion by steam or any other power or agency than being drawn by any horse or horses, or other beast or beasts of draught, any sum not exceeding 5*s.*"

The justices decided that the claim of toll was illegal, and that the appellants were guilty of the offence charged. The question for the opinion of the Court was whether this decision was correct.

A. P. Stone, for the appellants. The words of the section imposing a toll upon carriages, other than those previously specified, are large enough to include bicycles. *Taylor* v. *Goodwin* (1) has decided that a bicycle is a carriage within the meaning of the Highway Act, 5 & 6 Wm. 4, c. 50, s. 78, and it would be inconvenient if the word "carriage" should receive a different interpretation in two Acts of Parliament relating to highways.

W. A. Raikes, for the respondent, was not heard.

LUSH, J. I am of opinion that the conviction was right, and that a bicycle is not a "carriage" within the meaning of the Local Turnpike Act. Where the words employed by the legislature do not directly apply to the particular case, we must consider the object of the Act, and therefore in *Taylor* v. *Goodwin* (1) it was held that the words "furiously driving any sort of carriage" applied to a bicycle, for it was the object of the Act to prevent injury from the furious driving of any kind of vehicle. The present Act begins with imposing a toll upon particular carriages which are described "or other such carriage;" and then

(1) 4 Q. B. D. 228.

imposes a further toll upon "every carriage of whatever description, and for whatever purpose, impelled by steam or any other power not being that of horses." The carriages here referred to must be carriages ejusdem generis with the carriages previously specified. If a bicycle were held liable to pay toll as a carriage, I do not know where we could draw the line.

BOWEN, J., concurred.

Judgment for the respondent.

Solicitors for appellants: *Morley & Shirreff.*

Solicitors for respondent: *Milne, Riddle, & Mellor.*

NATIONAL MERCANTILE BANK, LIMITED *v.* HAMPSON.

Feb. 21.

Bill of Sale—Implied License for Grantor to carry on Business and dispose of Goods—Liability of Purchaser.

Claim. That plaintiffs were holders of a bill of sale duly registered, comprising amongst other things all the growing crops and all the goods, chattels, and effects which then were or thereafter should be on or about the farm and premises of S., farmer, and that defendant wrongfully deprived the plaintiffs of the use and possession of twelve quarters of wheat comprised in the bill of sale.

Defence. That the plaintiffs suffered S. to have the possession of the goods, and to hold himself out as having not only the possession but the property in them, and that he sold the same to the defendant, who bought them in the ordinary course of business, and without any notice that they did not belong to S. That S. was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale, and it was the ordinary course of business of S. in such business to make such sales:—

Held, that the defence was good, for the bill of sale by implication conferred a license on the grantor to carry on his business and dispose of the goods so as to give a valid title to purchasers.

5 C.P.D. 359
360
16 C.L.D. 510
6 Q.B.D. 621

CLAIM, stating that the plaintiffs were a limited company carrying on business at 16 and 17 Russell Street, Covent Garden, Middlesex, and the defendant was a corn merchant carrying on business at Old Market, Wisbeach, Cambridge. That plaintiffs were the holders of a bill of sale dated the 13th of January, 1879, and duly registered on the 14th of January, 1879, comprising amongst other things all the growing crops and all the goods, chattels, and effects which then were or thereafter should

1880

NATIONAL MERCANTILE BANK v. HAMPSON.

be on or about the farm lands and premises of one Samuel Seaman, of Tilney St. Lawrence, Norfolk, farmer and dealer. That on or about the 2nd of October, 1879, the defendant wrongfully converted to his own use and deprived the plaintiffs of the use and possession of twelve quarters or thereabouts, of wheat comprised in the bill of sale. That the plaintiffs had demanded of the defendant the return of the said wheat, but the defendant continued to wrongfully detain the same from the plaintiffs.

Defence. That the plaintiffs suffered Seaman to have possession of the goods, and enabled him to hold himself forth as having not only the possession but the property in the same, and that he sold the same to the defendant, who bought them in the ordinary course of his business, and without any notice that they did not belong to Seaman. That Seaman was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale, and it was the ordinary course of Seaman in such business to make such sales.

Demurrer.

Lyon, in support of the demurrer. The plaintiffs, having duly registered the bill of sale, were under no liability to give public notice that the goods comprised in it were their property. Neither were they bound to prevent the grantee from carrying on his business. The defendant bought the goods from one who could convey no title to them, and must take the consequences.

R. T. Reid, for the defendant, was not heard.

LUSH, J. I think the defence is good, and that the action cannot be supported. Having regard to the terms of the bill of sale, there was an implied license for the grantor to carry on his business, and to sell the wheat, and any bonâ fide purchaser from him would have a good title.

MANISTY, J., concurred.

Judgment for the defendant.

Solicitor for plaintiffs: *J. T. Irving.*

Solicitors for defendant: *Plews, Irvine, & Hodges.*

THE QUEEN *v.* SHEWARD.

1880
Feb. 27;
March 4, 10.

Lands Clauses Consolidation Act, 1845—*Compensation—Matter not Legally the subject of Compensation—Application to quash Inquisition—Certiorari, Writ of—Discretion.*

Upon an application for a writ of certiorari to bring up and quash the proceedings upon an inquisition before the sheriff as to the amount of compensation to be awarded to a claimant under the Lands Clauses Consolidation Act, 1845, on the ground that the jury in assessing the compensation had taken into consideration matters which were not legally the subject of compensation :—

Held, that the Court, having a discretion whether they would grant a writ of certiorari, would not do so where the applicants for the writ had allowed five months to expire without making any objection to the proceedings and had paid costs, and taken various other steps upon the footing that they were valid.

Semble, that as a general rule the writ of certiorari ought not to be granted in such a case after the expiration of the time allowed for setting aside an award made under the provisions of the above mentioned Act.

APPLICATION for a writ of certiorari to bring up the proceedings taken before the sheriff of Middlesex with respect to a claim for compensation under the Lands Clauses Consolidation Act.

The facts and the nature of the arguments sufficiently appear from the judgment.

Feb. 27; Mar. 1. *Sir H. James, Q.C.*, and *Biron*, shewed cause against the rule for a certiorari.

Sir H. Giffard, Q.C., S.G., *Bidder, Q.C.*, and *J. G. Hollway*, supported the rule.

The following authorities were referred to: *Reg.* v. *South Holland Drainage Committee* (1); *Reg.* v. *Manchester and Leeds Ry. Co.* (2); *Mortimer* v. *South Wales Ry. Co.* (3)

Cur. adv. vult.

March 10. The judgment of the Court (Lush, Manisty, and Bowen, JJ.) was delivered by

MANISTY, J. This was a rule moved for on the 21st and issued on the 23rd of July, 1879, calling upon Mr. Sheward to shew

(1) 8 A. & E. 429. (2) 8 A. & E. 413.
(3) 28 L. J. (Q.B.) 129; 1 E. & E. 375.

1880

THE QUEEN v. SHEWARD.

cause why a writ of certiorari should not issue to remove into this Division of the High Court of Justice an inquisition verdict and judgment taken before the under-sheriff of Middlesex on the 14th, 15th, 18th, and 19th of February, 1879, touching the claim to compensation made by Mr. Sheward, whom I shall afterwards call the claimant, against the Metropolitan and St. John's Wood Railway Company, whom I shall call the company, in respect of his interest in certain lands, &c., upon the ground that the jury assessed compensation upon heads of claim upon which they were not entitled by law to do so.

The facts upon which the company seek to have the inquisition removed, with the view to its being quashed, are that the claimant had a leasehold interest in certain premises at Mapesbury Farm, Willesden, on which he trained and exercised steeplechase horses and hunters, and the company, by virtue of their special Act, which incorporated the Lands Clauses Consolidation Act, 1845, had the power compulsorily to take part of the property for the purposes of their undertaking, making the usual compensation.

In December, 1875, the company gave the usual notice to treat for a part of the claimant's premises, and the question of the amount of compensation to be paid by the company came on to be tried before the under-sheriff of the county of Middlesex and a jury on the days I have mentioned. In the result the jury gave a verdict for the claimant for 6000*l.*

The claimant contended that the consequence of the company taking part of his property and constructing a railway upon it would be that the residue would be unfit for his business, and that he would be compelled to sell off his horses at a forced sale and relinquish his business, and he claimed compensation not only for his interest in the land actually taken from him, but for all the consequential injury he would thus sustain.

A great deal of evidence was given on both sides without objection as to the amount of the loss which the claimant alleged he would sustain, and the jury assessed the compensation at 6000*l.*, including a large sum for loss in respect of the claimant's business.

The inquisition was signed on the 19th of February, 1879.

The claimant proceeded in due course to tax his costs. The

taxation was completed on the 1st of April, and on the 17th of April the amount for which the allocatur was given, viz., 392*l.* 12*s.* 2*d.*, was paid without any objection or protest.

The company having required an abstract of the claimant's title to be furnished, it was furnished in the month of May. A good deal of correspondence passed between the solicitors respecting the title, and requisitions were made by the company's solicitors, all of which were answered by the claimant's solicitors. The company's solicitors then prepared the draft of the assignment to be executed by the claimant, and on the 3rd of July, sent it to the claimant's solicitors for approval.

In that draft assignment it was recited that the amount of the purchase-money and compensation payable in respect of the premises had been duly ascertained by a jury to be the sum of 6000*l.*

In the course of the correspondence between the solicitors, the claimant's solicitors frequently pressed for payment of the 6000*l.* In particular the claimant's solicitors on the 28th of April wrote to the company's solicitors, saying they were instructed to press for the immediate payment of the 6000*l.*, with interest, in answer to which the company's solicitors on the 30th of April, acknowledged the receipt of that letter, and said if you will supply us with abstract of title we will proceed with the assignment as quickly as possible. On the 2nd and 3rd of May, the claimant, finding it impossible to carry on his business of a horse-dealer and trainer, on the part of the premises not taken by the company, sold off his plant and stock of horses. On the 12th of May, the claimant's solicitors sent the abstract of title and again asked for payment of the 6000*l.*

On the 11th of June, 1879, not having received the 6000*l.*, the claimant's solicitors issued a writ specially indorsed for the recovery of the amount and sent it to the company's solicitors, who on the 13th of June, wrote to the claimant's solicitors as follows:—

"We return writ with acceptance of service indorsed and regret that you should have thought it necessary to commence proceedings. The abstract of title is now with our counsel with whom we left it, after failing to obtain the production of the deeds the other day, and we will proceed to complete the purchase as soon as

1880

THE QUEEN v. SHEWARD.

possible; there will therefore be no occasion for any further steps under the writ."

Further correspondence took place as to the title, and after waiting some time the claimant's solicitors proceeded with the action for recovery of the 6000*l.*, and on the 29th of July, the company delivered their statement of defence, by which they, for the first time, objected to the validity of the inquisition, save that they had, without notice to the claimant, on the 21st of July, applied for and obtained the present rule for a certiorari to bring up the inquisition for the purpose of quashing it.

The question is whether under these circumstances the Court should make the rule absolute.

On behalf of the company it is contended that the sum assessed includes compensation for things in respect of which the jury had no jurisdiction to give compensation, and that consequently it is invalid.

On behalf of the claimant it is contended, that assuming such to be the case, the company cannot now apply to have the inquisition quashed, inasmuch as they not only made no objection to the admissibility of the claim or the evidence in support of it before the under-sheriff or to the summing-up of the under-sheriff, but they have acquiesced in the inquisition and acted upon it, and allowed five months to elapse before taking any proceeding with the view of having it quashed.

We are of opinion that the contention of the claimant is well founded.

It is discretionary in the Court, in a case like the present, whether it will grant a certiorari: *Reg.* v. *South Holland Drainage Committee* (1); and we think, as a general rule, a certiorari to bring up an inquisition taken under the Lands Clauses Consolidation Act, 1845, for the purpose of quashing it, should not be granted after the expiration of the time allowed for setting aside an award made under the powers of the same Act. That time had elapsed in the present case, in addition to which both parties had in the interim acquiesced in and acted upon the inquisition.

The Solicitor General offered, on the part of the company, to undertake not to require repayment of the costs in the event of

(1) 8 A. & E. 429.

the inquisition being quashed, and to submit to any other terms the Court might think it right to impose; but we are of opinion that, under all the circumstances, the Court ought not to interfere. If the claimant was the party applying for a certiorari on the ground that the under-sheriff had excluded some head of damage which was properly the subject of compensation, we think he clearly would have been too late, having received the costs and acquiesced so long in the inquisition, and we do not think the company are in any better position, the only difference being that they have paid instead of receiving the costs.

It was assumed upon the argument that the jury had taken into consideration and assessed compensation for matters which were not properly the subject of compensation. We have looked into the shorthand writer's notes of the proceedings before the under-sheriff and of his summing up, and, without expressing any opinion upon the point, we think it is open to considerable doubt whether the jury in the present case exceeded their jurisdiction, having regard to the law as laid down by the House of Lords in the case of the *Duke of Buccleuch* v. *Metropolitan Board of Works.* (1)

In that case the distinction was taken between the case of a claimant who simply complains of annoyance and loss caused by the use of a railway sanctioned by the legislature, and that of a person, like the present claimant, who being owner of property, is compulsorily deprived of part of it for a purpose which subjects him to annoyance and loss, to which he would not otherwise have been subject. The House of Lords decided that part of the duke's land having been taken compulsorily for the purpose of making the Thames Embankment, the arbitrators had a right to take into consideration and award compensation for the loss of privacy and the increase of dust and noise consequent upon the creation of the embankment.

In the present case the claimant insisted before the under-sheriff that, part of his land having been taken compulsorily for the purpose of making a railway, the jury had a right to take into consideration and to award compensation for all his consequential loss and injury, including loss sustained by reason of his not being able to carry on his business on the remainder of his property.

(1) Law Rep. 5 H. L. 418.

1880

THE QUEEN v. SHEWARD.

The question whether that contention was well founded has not been raised before us, and we do not consider it necessary to have it argued, because we are clearly of opinion that under the circumstances to which we have adverted, and for the other reasons we have given, the application for a certiorari is too late, and that the rule ought to be discharged with costs.

Rule discharged with costs.

Solicitors for claimant: *G. M. Allen & Son.*
Solicitors for company: *Burchells.*

March 3.

REED *v.* HARVEY.

Bankruptcy—Disclaimer of Leasehold Interest—Leave of Court—Application to Trustee to Disclaim—Service of, by Post—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24—*Bankruptcy Rules*, 1870, *rule* 14—*Bankruptcy Rules*, 1871, *rule* 28.

5 Ch D 164
17 Ch D 533

The 28th rule of the Bankruptcy Rules, 1871, provides that when any property of a bankrupt acquired by a trustee in bankruptcy shall consist of a leasehold interest the trustee shall not execute a disclaimer without the leave of the Court:—

Held, that the effect of the rule was to make it the duty of the trustee as between himself and the Court of Bankruptcy to obtain the leave of the Court before disclaiming a tenancy, but that it did not render the disclaimer inoperative as between the landlord and the trustee where no such leave had been obtained.

The mere posting of an application to the trustee in bankruptcy requiring him to decide whether he will disclaim or not is not sufficient under the 24th section of the Bankruptcy Act, 1869, but such application must be received in order that the time for disclaimer may be limited in accordance with the section:—

Semble, that the application would be received within the section if delivered through the post at the office of the trustee to the person there in charge.

APPEAL from the county court of Hull.

The action was brought to recover a quarter's rent of a shop and premises due the 1st of November, 1879. The facts at the trial appeared to be as follows: The plaintiff had let the premises to one Mortimer, who subsequently became bankrupt. The defendant was the trustee of the bankrupt's estate, and was appointed on the 2nd of October, 1879. On the 7th of October the plaintiff's solicitors sent to the defendant by the post a registered letter requiring him to decide whether he would disclaim

the tenancy or not. Receiving no answer, on the 12th of November they wrote again applying to the defendant for payment of the quarter's rent. Some correspondence then ensued in which the plaintiff's solicitors referred to the notice given by them to the defendant calling on him to elect whether he would disclaim, but the defendant expressed complete ignorance as to the notice alluded to. It was alleged on the part of the defendant that he had never personally received the letter of the 7th of October, and it was suggested that a clerk of the defendant's, who had proved dishonest, might have kept it back from the defendant. The evidence however on this point was not gone into in consequence of the county court judge ruling that it was sufficient under the 24th section of the Bankruptcy Act, 1869, to prove that the notice had been posted. Ultimately the defendant wrote to the plaintiff's solicitors disclaiming the tenancy, but he did not obtain the leave of the Court to make such disclaimer. The county court judge held that the defendant was liable, and gave judgment against him for the amount claimed.

A rule nisi having been obtained for a new trial,

March 3. *Wills, Q.C.* (*Forbes*, with him), shewed cause. By the 24th section of the Bankruptcy Act, 1869, if notice is given to the trustee to disclaim he must disclaim, if at all, within twenty-eight days after the notice. The notice to disclaim was sufficiently given so as to bind the trustee under the 24th section by the posting of the letter of the 7th of October, and it is immaterial whether the letter was received. The 14th rule (Bankruptcy Rules, 1870), provides that all notices and other proceedings for the delivery of which no special mode is provided may be sent by prepaid post letter to the last known address of the person to be served therewith.

[LUSH, J. The application under s. 24 of the Act is hardly a notice or proceeding such as appears to have been contemplated by this rule. The rule seems rather to apply to matters incidental to the bankruptcy proceedings.]

The decision in the *Household Fire Insurance Co.* v. *Grant* (1) is somewhat in pari materiâ.

(1) 4 Ex. D. 216.

1880

REED v. HARVEY.

[LUSH, J. That case seems rather to turn on the doctrine of an implied authority when an offer is made by post to accept by post.]

Secondly, there can be no disclaimer of a lease except by leave of the Court: see rule 28 (Bankruptcy Rules, 1871.) Therefore the disclaimer was inoperative.

[LUSH, J. The rule may make it a breach of duty on the part of the trustee to disclaim without the leave of the Court, but can the rule qualify the effect of the 23rd section, which gives power to the trustee to disclaim?]

The power to make rules is very extensive: see s. 78 of the Bankruptcy Act, 1869.

Leese, supported the rule. The twenty-eight days given to the trustee for disclaiming run "from the receipt of such application." The effect of the 28th rule cannot be to make the disclaimer void. The sanction of the Court is required for the protection of the creditors, and it may be a breach of the trustee's duty to disclaim without it, but as between the trustee and the lessor the disclaimer is operative.

Cur. adv. vult. (1)

March 6. The judgment of the Court (Lush and Manisty, JJ.) was delivered by

LUSH, J. We cannot entertain a doubt that when the disclaimer has been given by the trustee it is operative, nowithstanding that the leave of the Court may not have been obtained to disclaim in accordance with the rule. We cannot think that the rule is intended to do more than to regulate the conduct of the trustee as between him and the Court. If it had in terms gone further, we should have been prepared to hold that it was ultrà vires, being inconsistent with the enactment of the statute itself. The power to make rules is a power given in order to carry into effect the enactments of the statute, and the Act says that the disclaimer

(1) The Court took time to consider the judgment because of a suggestion during the argument that there had been an unreported decision of the Court of Appeal concluding the present case, and the Court therefore wished to make inquiry as to the existence of any such decision. It was stated, however, by Mr. Justice Lush, before delivering the judgment as below, that it turned out on inquiry that there had been no such decision.

by the trustee shall be operative and shall have effect. Therefore, we must hold that there was an effectual disclaimer by the trustee, which, according to the terms of the Act, had relation back, so as to make the lease theoretically surrendered at the time of the bankruptcy, and, therefore, so as to relieve the trustee from liability to rent, just as if the lease had been surrendered on the day the trustee was appointed. That is the plain intention of the statute, and to that we must give effect.

Then comes the only remaining question, viz., whether the trustee has been called upon to disclaim, so that, having omitted for twenty-eight days to do so, the subsequent disclaimer would come too late. We expressed an opinion at the time during the argument that the mere fact that the lessor had written and posted as a registered letter a request or requisition to the trustee to disclaim was not enough, and that he was not entitled to rely upon such posting as conclusive. We do not think that it is enough merely to prove such posting, at all events, where the assertion of the trustee is that he never received the letter. We think the evidence ought to have been gone into with regard to the delivery or non-delivery of the letter. If it were shewn that the letter was delivered at the defendant's address to the person in charge, then we do not think it would be an answer on the part of the trustee to say, that his clerk took it in, and never delivered it to him. We think the delivery at the office of the trustee would be equivalent to a delivery to him in person. We think, therefore, that the case must go back to the learned Judge of the County Court, so that he may determine the question, on evidence produced before him, whether the registered letter was in fact delivered at the office of the trustee or not. If it was, then the disclaimer was too late, and we think the trustee is legally liable to pay the rent. On the other hand, if the letter was never delivered, then we think the trustee was not called upon to disclaim, and the disclaimer was in time, and has relation back, so as to relieve the trustee from all liability.

Rule absolute for a new trial.

Solicitors for the plaintiff: *Bell, Brodrick, & Gray.*
Solicitor for the defendant: *George Lockyer.*

1879
Dec. 5.

[IN THE COURT OF APPEAL.]

SIMM AND OTHERS *v.* ANGLO-AMERICAN TELEGRAPH COMPANY.
ANGLO-AMERICAN TELEGRAPH COMPANY *v.* SPURLING AND OTHERS.

Company—Forged Transfer of Stock—Certificate of Registration—Estoppel.

C. owned stock in a company incorporated under the Companies Act, 1862 His clerk, P., contracted to sell stock in the company to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the company for registration. The company sent a letter to C. inquiring whether the transfer was correct: as they received no answer from him, they registered the transfer. B. borrowed money from a bank, and by way of security for the loan the stock was transferred by S. at the request of B. to I. as trustee for the bank, and the company registered I. as owner and issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, and the stock was held by I. as a bare trustee for B. The forgery was discovered, and the company then refused to acknowledge I. as the holder of the stock. In an action brought by B. and I. to compel the company to to recognise their title:—

Held, that although I., as trustee for the bank, might have acquired a good title by estoppel against the company, yet that title ceased when the loan by the bank was paid off, and that no estoppel existed in favour of B. against the company; for B. in contracting, through S., to buy the stock belonging to C. had acted on the faith of the forged transfer, and had not relied upon any act of the company, and by sending the forged transfer to the company had induced them to recognise his nominee as the holder, and that the action would not lie.

In re Bahia and San Francisco Ry. Co. (Law Rep. 3 Q. B. 584); *Hart* v. *Frontino, &c., Gold Mining Co.* (Law Rep. 5 Ex. 111); and *Knights* v. *Wiffen* (Law Rep. 5 Q. B. 660) discussed.

THE first of these actions was brought for wrongfully representing that certain persons were registered holders of stock in the defendants' company and as such had title to transfer and sell the same, and also for the recovery of the purchase-money of the stock and the dividends thereon. The second action was for an indemnity.

The facts are commented upon in the judgments of Lindley, J., and the Lords Justices hereinafter set out; they may be here shortly stated as follows:—

In November, 1876, Coates was the owner of 5000*l.* stock in the Anglo-American Telegraph Company which was registered under the Companies Act, 1862, and upon the 26th of that month

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Phillips, who was a clerk to Coates, instructed Thompson a broker to sell 5000*l.* stock in that company. Burge, Brown, and Dennis, became the ultimate buyers of that amount of stock, and they passed the names of P. Spurling and J. Skinner as transferees. The transfer to P. Spurling and J. Skinner purported to be executed by Coates, but it was in truth a forgery. Upon the 2nd of December, Spurling and Skinner, acting for Burge, Brown, and Dennis, presented the transfer to the company for registration; the company thereupon forwarded to Coates a written notice of the transfer, to which, however, they received no reply, the notice to Coates having been intercepted by Phillips. In the matter of the transfer Spurling and Skinner were mere nominees and trustees for Burge, Brown, and Dennis. Upon the 6th of December the forged transfer was registered, but before a certificate was issued to Spurling and Skinner, they by a transfer dated upon that day transferred to Simm and Ingelow 10,000*l.* stock in the company. This sum of 10,000*l.* included the sum of 5000*l.* supposed to have been bought from Coates. The transfer to Simm and Ingelow was lodged with the company for registration, and the company gave notice thereof to Spurling and Skinner. Subsequently Simm and Ingelow were registered as transferees of 10,000*l.*, and by a certificate dated the 9th of December, the company certified that Simm and Ingelow were the registered holders of 10,000*l.* stock. Ingelow was the manager, and Simm was the secretary of the National Bank, London, and they accepted the stock as trustees for Burge, Brown, and Dennis, subject to any lien or claim which the National Bank might have thereon. The bank made advances to Burge, Brown, and Dennis, upon the security of the 10,000*l.* stock. Up to the 1st of August, 1877, dividends on the stock were paid to Simm and Ingelow, but the forgery of the transfer purporting to be executed by Coates was then discovered and verbal notice thereof was given to them, and on the 19th of September they received written notice from the solicitors to the telegraph company, that the transfer to Spurling and Skinner was forged, and that Coates claimed to be the proprietor of the stock. On the 19th of September 5000*l.* was due from Burge, Brown, and Dennis, to the National Bank, but on the 28th of September this sum was paid off, and no further

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

advances were made to them by the bank against the stock, which had belonged to Coates. Upon the 7th of November the dividend was paid by mistake to Simm and Ingelow, but in February, 1878, the telegraph company refused to pay any further dividends to them. The writ of summons in the first action was issued on the 14th of March, and in the second on the 29th of March, 1878.

The actions came on for trial before Lindley, J., when it was agreed that Burge, Brown, and Dennis, should be added as plaintiffs in the first action, and as defendants in the second. The following judgment was delivered:—

1878. Dec. 20. LINDLEY, J. It appears to me that the first action is comparatively simple; the second action is much more difficult. Before I give my reasons for my judgment, I will state at once the inferences of fact which I draw, as distinguished from those about which there is no dispute; and the main inference of fact which I draw is this: that no negligence in the sense of want of reasonable care is to be imputed to Spurling and Skinner, who left this forged transfer with the telegraph company, none to Simm and Ingelow, none to Burge & Co., and none to the telegraph company. I say that because there are clumsy forgeries and there are clever forgeries, and on looking at the forged transfer, I am bound to state that the forgery appears to me to have been so skilfully done, that in my opinion the clerks and officers of the telegraph company were not guilty of any want of reasonable care in failing to observe that it was a forgery. What the legal consequences of that may be, I will consider presently; but I think that is nearly the only inference of fact which it is necessary for me to draw. Fraud is not imputed to anybody with whom I have to deal, and I absolve all parties from negligence in the sense of want of reasonable care. Now, let me take the case step by step, and see how it works out. The facts are these. In November, 1876, Mr. Coates was the registered owner of 5000*l.* stock in the Anglo-American Telegraph Company. On the 29th of November, Phillips, his clerk, procured and forged a transfer, which was handed to Spurling and Skinner, and they, knowing nothing about the forgery, and not being guilty of any want of reasonable care, took it as a genuine document. That

transfer having been executed, it was sent by Spurling and Skinner to the office of the telegraph company, and, on the 2nd of December, 1876, a clerk of the company sent the usual notice to Mr. Coates, addressed to him at his usual place of business, which notice was in these terms: "I beg to inform you that a transfer, purporting to have been signed by you, has been left at the offices of the company, and unless I hear to the contrary, it will be assumed to be correct." Unless that was answered, the company would not have their suspicions aroused; and, in point of fact, it was not answered; therefore the company assumed the transfer to be genuine. On the 6th of December, Spurling and Skinner were registered as the owners of this stock, pursuant to that transfer. At that time Spurling and Skinner held this stock as trustees for Burge & Co. By an arrangement between Burge & Co. and the National Bank, Burge & Co. undertook to procure a transfer of that stock to the National Bank, and the National Bank undertook to allow Burge & Co. to draw upon them. Accordingly, upon the 6th of December the transfer was executed from Spurling and Skinner to Simm and Ingelow. About the 9th of December a notice from the company was sent to Spurling and Skinner, to which, in like manner, they received no answer. The telegraph company, therefore, naturally inferred again that all was correct, and Simm and Ingelow were registered as holders of this stock, and they obtained the usual stock certificate. Spurling and Skinner had not, in fact, obtained a certificate; it had been prepared, and would probably have been issued to them, had they remained on the register. Pausing there for a moment, let me see what the position of Simm and Ingelow then was. They were, in fact, holders for value of that stock; I say for value, because, although they did not pay Spurling and Skinner anything, the value which they gave to Messrs. Burge & Co. was this, that in consideration of having this stock transferred into the names of Simm and Ingelow, the National Bank, who were the cestui que trusts of Simm and Ingelow, allowed Burge & Co. to draw upon them. Therefore, it appears to me that Simm and Ingelow were not in the proper sense of the words mere trustees for Burge & Co., or merely identified with Burge & Co., but they were also in law and equity, as they were in fact, trustees for the National Bank, who had

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Lindley, J.

acquired this stock bonâ fide and for value from persons who were in point of fact registered by the company as holders. What had the company done to induce the National Bank to become holders of these shares in the names of their trustees, Simm and Ingelow? They had in point of fact registered Spurling and Skinner, that is to say, they had done that which apparently conferred upon them power to transfer the stock and to give a good title, and upon the strength of that the National Bank took this stock for value, and they allowed Burge & Co. to draw upon them. It appears to me, therefore, that the title of Simm and Ingelow, as between themselves on the one side and the telegraph company on the other, was a good title by estoppel. I do not doubt that in the least. I think *In re Bahia and San Francisco Ry. Co.* (1) and *Hart* v. *Frontino, &c., Gold Mining Co.* (2) go to that length fully; and, subject to a remark which I shall make presently as to the effect of the bank having been paid off, it appears to me that if the case stood there the title of Simm and Ingelow against the company would be a good title by estoppel, founded, I will not say upon misrepresentation, because perhaps it is rather a harsh word, but upon the acts of the company themselves in accepting Spurling and Skinner, under a mistake no doubt, but still in accepting them and putting them in a position to hold themselves out as owners of the stock and entitled to transfer it; and upon the faith of that Simm and Ingelow acted, and are entitled to say that they did act as the truth was. It has been argued, however, that as Simm and Ingelow have been paid off, their title as between them and the company has ceased; and it is contended that on and after the 28th of September, 1877, Simm and Ingelow held this stock solely in trust for Burge & Co., and that inasmuch as it was by Burge & Co.'s fault that the company were induced to put this stock into the names of Simm and Ingelow, the latter, who now merely represent Burge & Co., cannot take advantage of the transaction. The argument appears to me to be met by two observations. In the first place I quite agree with what the counsel for the telegraph company has urged, namely, that the title of Simm and Ingelow was not a legal title as distinguished from a title by estoppel. If the two are to be contrasted, it was a title

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 5 Ex. 111.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Lindley, J.

by estoppel; but, on the other hand, what does that mean? When it is said that a company is estopped from denying a title, what is that but that they are estopped from denying the legal title? I do not understand that they are estopped from denying any other title. It appears to me, therefore, on that view of the case, that it will stand in this way: Simm and Ingelow had acquired, as between themselves and the telegraph company, a good title by estoppel. When did they lose that title? Not, in my judgment, by any fluctuations of the account between themselves and Burge & Co., nor by anything which has affected the relation in which they stood towards Burge & Co. That is one answer I give. The other answer is this, that even if Simm and Ingelow were in point of fact trustees for Burge & Co. after the 28th of September, and even if we are to look behind the title created by estoppel, nevertheless, for reasons which I shall give presently, I still think that their title must prevail against the company's. I shall give my reasons for that hereafter, when I come to deal with the second action. I merely notice the point now for the purpose of shewing that I do not overlook it or intend to pass it by. But it appears to me, as regards the first action, that the title which Simm and Ingelow acquired as bonâ fide holders for value, without notice of anything wrong as to this stock, as between themselves and the company never ceased. I cannot say that they are entitled to stock, because the company cannot be sued for stock which they do not possess, nor am I prepared to say that I ought to compel the company to go into the market and invest their capital in the purchase of their own stock. There may be a legal difficulty about that. But the consequence of my view of the case will be that Simm and Ingelow were entitled to the value of the stock at the time when the company denied their title. That appears to be the rule adopted in the case of *In re Bahia and San Francisco Ry. Co.* (1) They are entitled in the first action to the value of the stock at that time and to the payment of that value; the certificate ought to be delivered up to the company to be cancelled, and the company are to be at liberty to remove the names of Simm and Ingelow from the register in respect of that 5000*l.* stock. That

(1) Law Rep. 3 Q. B. 584.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Lindley, J.

will put matters right as far as I can see in the first action, the telegraph company to pay the costs of it.

With regard to the second action, which is much more difficult to deal with, it appears to me, after the best consideration which I can give to the case, that the company must bear the loss, for this reason:—The question really turns on the effect of the purchaser of stock taking to the company for the purpose of registration a transfer supposed to be genuine, but not genuine; and in order to ascertain the effect of that I must look at the obligations, if any, under which he is to the company, and the obligations, if any, under which the company are to him, and for the purpose of unravelling this part of the case, which is by far the more difficult, let me first see what the obligations are of a person taking a transfer to the company. Now does he represent anything more than this, that so far as he knows, it is a good and valid document? Is there any authority for saying that he does more than that? Of course, if he takes a transfer to the company, knowing that something is amiss with it, he must take the consequences of his own knowledge; he cannot fasten any obligations upon the company. But supposing that he knows nothing wrong about it, are the company entitled to say to him, "We assume, from the fact that you bring this tranfer to us, that it is a genuine document." I apprehend that they are not entitled to say so to him. They are only entitled to say to him, "We assume that you come honestly to us, and that you do not know that anything is amiss with regard to the transaction." Now, let me see what their obligation is. Their obligation by statute is to keep a proper register; it is a duty imposed upon them by s. 29 of the Companies Act, 1862; and further than that, when a transfer is brought to them to be acted upon, they do in point of fact take upon themselves the duty or the task of making inquiries about it; and it appears to me that when a person innocently and honestly takes a transfer to the company, it is no more than a statement by him to the following effect: "So far as I know, the transfer is a genuine document: I shall leave it with you for a certain time to make inquiries, and if you make inquiries and find that it is a genuine document, of course you will receive me as a stockholder; if, on the other hand, the result of the inquiries

is to shew that it is not a genuine document, then of course you will not register me as a stockholder." It appears to me that the case is stronger against the company than the case of a customer is against a banker paying a forged cheque: a banker is under an obligation to pay the cheques of his customers and of no one else, and if he pays the cheque of someone else, he cannot charge a customer with the amount paid upon it. In this case a statutory duty is imposed on the company to keep their own register correctly; and that is a duty, not only towards persons who are actually stockholders, but also towards persons dealing in shares or stock, and I make that observation because I think it warranted by the judgments in both *In re Bahia and San Francisco Ry. Co.* (1) and *Hart* v. *Frontino, &c., Gold Mining Co.* (2), as well as by the section of the Act. Why is the register to be kept? It is open to inspection by anybody on the payment of a fee, and the object is that it may be seen who is and who is not on the list of stockholders. And it appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after the transfer of stock or shares standing in the names of persons on the register; and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this, that there being no negligence in the sense of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties the loss must fall upon the company, and their claim for indemnity against Spurling and Skinner or against Burge & Co. fails. The utmost which the company are entitled to say is this, "It was your duty not to produce to us to be acted upon any transfer which you knew or suspected to have been forged." I think that the duty of the persons bringing the transfer does not go beyond this. Can the claim against Skinner and Spurling be sustained by looking at it from what I call a broader point of view? The first of these actions is brought against the company, and the second is in reality brought against

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 5 Ex. 111.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Lindley, J.

Burge & Co.: can it be said even if the question be looked at as between Burge & Co. on the one side and the company on the other, that the loss ought to fall on Burge & Co., rather than on the company? I do not think it can. It appears to me that the case is analogous to the case of a forged cheque, and as a banker paying a forged cheque to an innocent holder for value cannot recover back its amount and is compelled to pay it twice over, so here the company must pay the amount of the stock twice over. The duty being cast upon the company to look after the register and the transfers, it appears to me that between two innocent parties the company are not entitled to claim compensation from Burge & Co. nor to resist at Burge & Co.'s expense the recognition of that title, which they themselves have created by their own act. It appears to me that Burge & Co. are entitled to say, "We did not deceive you; you made inquiries, and you accepted us as stockholders and put us on the register, and you cannot now turn round and say that as between you and us, we do not hold that position which you have led us to believe that we are entitled to." My conclusion is, that the telegraph company are in the wrong, though, of course, perfectly innocent parties, and what I propose to do is this, to order the telegraph company to pay Simm and Ingelow the value of 5000*l.* stock in that company on the 1st of February, 1878, and interest at the rate of 4 per cent. since that date. In the second action judgment will be entered for the defendants.

Judgment accordingly.

The Anglo-American Telegraph Company appealed from the judgment of Lindley, J., in each action.

1879. Nov. 29; Dec. 1, 2. *Watkin Williams, Q.C.* (*H. Davey, Q.C.*, and *Finlay*, with him), for the Anglo-American Telegraph Company. The question in the first action is, whether the company is estopped from denying the title of Simm and Ingelow and Burge & Co. to the 5000*l.* stock originally belonging to Coates. Perhaps until the advance to Burge & Co., was paid off, Simm and Ingelow had a title by estoppel against the company; but when the claim of the National Bank had been satisfied,

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Simm and Ingelow became bare trustees for Burge & Co., and the estoppel came to an end. Lindley, J., was wrong in holding that the title of Simm and Ingelow by estoppel became a legal title enforceable against the company after their interest in the stock ceased to exist. The real plaintiffs are Burge & Co., and they have no right against the company, for it was by their act that the company were induced to accept their nominees as owners. The only remedy, which a person claiming to be the holder of stock through a forged transfer has against the company, is by an action for damages. Burge & Co. rely upon *In re Bahia and San Francisco Ry. Co.* (1), and contend that the telegraph company are estopped from denying their title; but estoppel passes neither estate nor property in the subject-matter to which it relates. The facts in the present case bear some resemblance to those in *Hart* v. *Frontino, &c., Gold Mining Co.* (2), but that case was decided merely upon the authority of *In re Bahia and San Francisco Ry. Co.* (1), and ought not to be considered as extending its principle. Whatever Burge & Co. have lost, was lost to them when they accepted the forged transfer; with that the telegraph company had nothing to do; Burge & Co. have not been prejudiced by any act of the company, but upon the contrary they have derived a benefit, for owing to the registration of Simm and Ingelow as owners of the stock, Burge & Co. have been able to borrow money from the National Bank.

Even if the action does lie, the plaintiffs in the first action are not entitled to the full value of the stock; they can only recover the loss sustained from the fact that the lawful owner has claimed it. The plaintiffs can only sue for the conversion of the stock: *Woodley* v. *Coventry* (3); and in an action of that kind the damages must be confined to the actual loss: *Chinery* v. *Viall* (4); *Johnson* v. *Stear.* (5) Nothing has been lost by Simm and Ingelow who represent the National Bank; for the advance made by them has been paid off, and in estimating the loss sustained by Burge & Co. it is not to be forgotten that the amount of stock is limited

(1) Law Rep. 3 Q. B. 584.
(2) Law Rep. 5 Ex. 111.
(3) 2 H. & C. 164; 32 L. J. (Ex.) 185.
(4) 5 H. & N. 288; 29 L. J. (Ex.) 180.
(5) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

by the memorandum of association pursuant to the Companies Act, 1862, and the amount of capital in a company is not to be arbitrarily increased.

In the second action the company will in this court submit to a decision against them, if the judgment of Lindley, J., in the first action be reversed.

H. Davey, Q.C. (*Watkin Williams, Q.C.*, and *Finlay*, with him), for the telegraph company. As to the first action, at the trial Lindley, J., was of opinion that Simm and Ingelow had a good title to 5000*l.* stock by estoppel: it is nevertheless contended that they had no title to it. The view taken by Lindley, J., is fallacious, inasmuch as it depends upon the confusion of two kinds of estoppel, namely, estoppel by deed and estoppel in pais. It is true that estoppel by deed may operate so as to change property; but estoppel in pais does not come into operation until an action has been brought. Even Simm and Ingelow could not have successfully demanded to be registered as owners of stock: in order to create an estoppel effectual to pass property, there must be a person capable of granting the property either at the time when the estoppel is created, or afterwards when the property having come into possession feeds the estoppel. The foundation of an estoppel in pais is a representation, which another person is induced to take as the basis upon which he is to act: per Lord Blackburn in *Burkinshaw* v. *Nicholls*. (1) The damages recoverable in an action founded upon estoppel are measured by the loss actually suffered: *In re Bahia and San Francisco Ry. Co.* (2); Simm and Ingelow cannot recover damages from the company, for they have sustained no injury, and no estoppel exists in favour of Burge & Co.

As to the second action, it is to be observed that the property in the shares or stock of a company passes by the transfer; and the reasonable inference is that a person innocently bringing a transfer for registration must be taken to have warranted it to be genuine, if it afterwards turns out to have been forged. If the argument against the company be correct it would almost seem to follow that if a company issues a certificate to a supposed transferee producing a transfer which he knows to be forged, he

(1) 3 App. Cas. 1004, at p. 1026. (2) Law Rep. 3 Q. B. 584.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

may hold them liable in an action when they afterwards refuse to recognise him as a lawful holder of stock or shares.

Benjamin, Q.C., and *Bush Cooper*, for Simm and Ingelow, and for Burge, Brown, and Dennis. It is plain that Spurling and Skinner, acting for Burge, Brown, and Dennis, did not represent the transfer to be valid: *Leather* v. *Simpson* (1), following *Robinson* v. *Reynolds* (2), is a strong authority to shew that the presentation of the transfer for registration did not amount to a warranty that it was genuine. The company are estopped from denying the title of Burge & Co., if the latter were innocent of misrepresentation. It does not lie in the mouth of the company to argue that they were misled by the transfer; it was their duty to keep a correct register and to make inquiries.

[COTTON, L.J.:—Surely that duty exists only for the benefit of the transferor.]

The duty is imposed upon the company for the sake of both the transferor and the transferee. Moreover, in point of fact, the company did not act upon the faith of the transfer; they made inquiries by writing to Coates. An estoppel may exist in two ways: it may be created after as well as before the payment of money, because one person may be induced by the conduct of another not to take measures to protect himself. Upon a somewhat similar principle the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill, and if he receives the money and is suffered to retain it during the whole of that day, a person who pays the bill for the acceptor cannot recover the money back: *Cocks* v. *Masterman*. (3) An estoppel is a hypothetical state of facts, and the subject-matter of the estoppel must be dealt with as if the supposed state of facts really existed. In the present case the rights of the parties must be considered as if the stock mentioned in the certificate issued to Simm and Ingelow actually represented a part of the capital of the company. The certificate ascertained the position of those who were bonâ fide claimants to the stock mentioned in it, and dividends were paid in accordance with it to Simm and Ingelow or Burge & Co., whose interests in this

(1) Law Rep. 11 Eq. 398. (2) 2 Q. B. 196.
(3) 9 B. & C. 902.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

respect are identical. It has been argued for the company that, because Burge & Co. agreed to pay for the stock before the certificate was issued to their nominees, there can be no estoppel; but the fact, that the price had been previously settled, is not of itself a bar to the creation of an estoppel. An estoppel may exist, if by a representation a person is induced not to take steps to ascertain his true position, or even if he merely acquiesces in the representation: *Cocks* v. *Masterman* (1); *Knights* v. *Wiffen.* (2) It is not disputed on behalf of Burge & Co that the name of Coates was removed by the company from the register under a mistake, and that it must be restored; the legal right is in him; but the company are estopped from denying that Burge & Co. are stockholders. It is the duty of a company to ascertain whether a transfer is valid, and if they fail to do so they must indemnify the person who thereby suffers a loss: *Ashby* v. *Blackwell.* (3)

[COTTON, L.J.:—That case was really decided upon the ground that the company, by their secretary, had been guilty of negligence; at the time when the forged letter of attorney was delivered to them, it did not purport to have been executed according to the requirements of the constitution of the company.]

It has been argued for the company that the estoppel came to an end when Simm and Ingelow ceased to be interested in the stock as mortgagees; but the true view is, that they once had both a beneficial interest and a legal title; the beneficial interest has ceased to exist, and they have become bare trustees; but they retain their legal title, which enures for the benefit of their cestui que trusts, who are Burge & Co.

Day, Q.C., and *A. M. Channell*, for Spurling and Skinner.

W. Williams, Q.C., in reply for the company. It cannot be said that the company have committed any act conducing to the loss sustained by Burge & Co., and the latter have no right to an indemnity unless the company have done something which they were not entitled to do. *Ashby* v. *Blackwell* (3) is clearly not in point: there the forged instrument was brought to the company by the person who had committed the forgery, and in the view of the Lord Chancellor it was the admission and the acceptance into the

(1) 9 B. & C. 902. (2) Law Rep. 5 Q. B. 660.
(3) 2 Eden, 299; 1 Amb. 503.

partnership which constituted the title, and the purchaser trusted the company alone; but in the present case it is the transfer which constituted the title, and the loss was occasioned to Burge & Co. by their accepting from the broker, Thompson, a transfer, which proved to be a forgery. No duty was imposed upon the company in favour of Burge & Co. to make inquiries: they made the inquiry of Coates for their own benefit; for if a name is wrongly inserted upon the register, the company may sustain a loss. The position of Burge & Co. is like that of the drawee of a forged bill of exchange, who, if he accepts and pays it, or pays it only, cannot recover back the amount from an innocent payee: *Price* v. *Neal.* (1) The loss sustained by Burge & Co. is the consequence of their own act: their only remedy is against the broker Thompson, and also against Phillips if it were worth while to sue him.

Cur. adv. vult.

Dec. 5. The following judgments were delivered:—

BRAMWELL, L.J. I have come to the conclusion that the decision of Lindley, J., in the first action cannot be supported, and that our judgment must be for the company. Burge & Co. are now joined as plaintiffs; Simm and Ingelow continue to be plaintiffs, but they have no beneficial interest in the suit, and have merely a bare trust for the benefit of Burge & Co. Under these circumstances it seems manifest to me that the action must be dealt with as if Burge & Co. had been the sole plaintiffs, and as if Simm and Ingelow had been joined as defendants with the telegraph company, according to the practice in equity whereby all necessary parties were made either plaintiffs or defendants, or as if Simm and Ingelow had not been joined, and there had been no objection for want of parties, Burge & Co. being treated as the sole plaintiffs. I think it established as a matter of demonstration that Burge & Co. cannot have any greater right or better title against the company, because they procured the transfer to be made to Spurling and Skinner, and procured the names of Spurling and Skinner to be registered, and then caused Spurling and Skinner to transfer to Simm and Ingelow the stock standing

(1) 1 Wm. Black. 390.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Bramwell, L.J.

in the names of the latter. We must consider the action as if Burge & Co. themselves had taken to the company the document purporting to be a transfer signed by Coates, and as if the defendants had registered Burge and Co. as proprietors, and had issued to them certificates that they were stockholders. In that event would Burge & Co. have had the right against the telegraph company which they now claim? They would have had no true title, because the transfer purporting to be executed by Coates was a forgery; that is beyond doubt. Then, would they have had a title, or, if that word is inaccurate, a right by estoppel? That is to say, would the company have been estopped from saying that Burge & Co. were not the holders of that stock, and could not call upon the company to indemnify them? I do not wish to speak against the principle of estoppels, for I do not know how the business of life could go on, unless the law recognised their existence; but an estoppel may be said to exist, where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth. I do not undertake to give an exhaustive definition, but that formula nearly approaches a correct definition of estoppel. If the company are estopped from denying that Burge & Co. are stockholders, it must be because they are estopped from denying those circumstances which, if they had existed, would have constituted Burge & Co. stockholders. What are those circumstances? For a man to have a true title as the transferee of stock his transferor must have had the stock; his transferor must have executed an instrument of transfer, and the transferee must have accepted that instrument. The last-named condition is no doubt fulfilled, for Burge & Co. did intend to accept the supposed instrument of transfer. Upon general principles, and upon the authority of the cases cited to us, I think that the company would have been estopped from denying that Coates was the holder of the stock: but why are they estopped from denying that he transferred it? I desire to avoid using an expression involving a controversy as to points of law, and it is needless to say that Burge & Co. by their agents represented that Coates was a stockholder; but Burge & Co. sent to the company a document purporting to be a transfer from Coates, and in effect demanded to be registered as transferees

of the stock; to this demand the company assented. How can these facts constitute an estoppel against the company? What have they done that they should be debarred from saying that Coates did not transfer the stock? What more have they done than to accept the invitation of Burge & Co.? Let us look at the question from another point of view, and consider whether, if the company should desire to hold Burge & Co. responsible, the latter would be estopped from denying themselves to be stockholders. I know it may be said that estoppels are mutual and reciprocal, and that if the company are estopped, Burge & Co. likewise are estopped. But suppose that the company were desirous of saying to Burge & Co., "You have so conducted yourselves that as against you we have the right to affirm that to be the truth which is not the truth." Why would that be more unreasonable in the mouth of the company than it is in the mouth of Burge & Co.?

It seems to me impossible to hold, under these circumstances, that Burge & Co. are estopped. It has been argued upon their behalf that the company were estopped because it was their duty to make inquiries, and because it must be taken against them that they were satisfied by the inquiries which they had instituted, and that they affirmed to Burge & Co., not merely that Coates had been a stockholder, but also that he had executed the instrument of transfer. I dissent entirely from that argument. I believe that the system of inquiry by companies before the registration of a transfer is modern: no doubt that is a very reasonable and proper step for companies to take: nevertheless, as it seems to me, it is clearly a practice to which they have recourse for their own benefit, and not for the benefit of any one else; because, although there may be no estoppel between them and a person who brings transfers to them, there would be between them and his transferees, and therefore, in order to keep themselves out of trouble, they ought to endeavour to ascertain whether the transfer brought to them is a valid instrument. The existence of this practice does not help the case for Burge & Co. I cannot see any principle by which the company are precluded from saying to Burge & Co., "You brought us a forged transfer: we believed it to be genuine, and we have registered you as stockholders; but we are not precluded from saying that the

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Bramwell, L.J.

transfer was forged, and that you had not a real title." That argument seems, as a matter of principle, to express the ground of the decision at which we ought to arrive. Is there anything in the cases cited which ought to lead to a conclusion in favour of Burge & Co.? I think not. In *Knights* v. *Wiffen* (1) the Court of Queen's Bench held that the defendant had affirmed to the plaintiff that he held sixty quarters of barley separated from the rest at the plaintiff's disposition. The plaintiff had not told any untruth, nor had he, by any conduct on his part, offered any inducement to the defendant to make that statement. That case, therefore, is not like the present, where Burge & Co., however innocently, caused to be presented to the company a false and fraudulent instrument as genuine. The next case to which I will refer is *In re Bahia and San Francisco Ry. Co.* (2) From the facts in that case it appears that the transferees had acted upon the certificates issued by the company to former shareholders, or at least to supposed former shareholders, and the Court of Queen's Bench held that, inasmuch as the company had issued those certificates for the purpose of being acted upon, so that the shares might be sold or be used as a security for a loan, they were upon the principle of *Pickard* v. *Sears* (3), and cases of a similar kind bound to indemnify those who had acted upon the faith of those certificates. That state of facts does not exist here: the company have made no untrue representation: they issued certificates to Burge & Co., but this they were induced to do by the conduct of that firm. The next case is *Hart* v. *Frontino, &c., Gold Mining Co.* (4) In that case also the plaintiff had made no incorrect representation, he had not committed any mistake, upon the faith of which the defendants acted; but they admitted him as a partner, and he was induced to pay a call, and it was held, rightly or wrongly, that they were estopped from denying they were liable to indemnify him. That case, therefore, is no authority against our decision. I wish to say a few words as to my own judgment in *Hart* v. *Frontino, &c., Gold Mining Co.* (5) I am afraid that I did not perceive the effect of the certificates which

(1) Law Rep. 5 Q. B. 660.
(2) Law Rep. 3 Q. B. 584.
(3) 6 A. & E. 469.
(4) Law Rep. 5 Ex. 111.
(5) Law Rep. 5 Ex. 111, at p. 115.

had been issued, and did not appreciate the judgment in *In re Bahia and San Francisco Ry. Co.* (1) I can see now that the form of the certificates was important, and perhaps the case in the Court of Queen's Bench did not govern the case in the Court of Exchequer. If the decision in *Hart* v. *Frontino, &c., Gold Mining Co.* (2) was wrong, it will be competent to this Court at a proper moment to overrule it: I think, however, that it was not wrong, but that it does not apply to the present case.

In the view which I take it is unnecessary to consider whether, in order to support the suggested estoppel, it is imperative that any damage should have accrued to Burge & Co., and whether in point of fact they have suffered any damage. I frankly own that even if Burge & Co. could be shewn to have missed a benefit, or incurred a loss by the conduct of the company, the legal result would be the same: the misfortune of Burge & Co. arose from their having accepted a forged transfer.

I wish it to be distinctly understood that I do not express any opinion whether the second action would have been maintainable, if any damage had accrued to the company: cogent arguments no doubt may be adduced in favour of either view; but the company are willing to pay the costs of the action brought by them rather than have a doubtful question discussed, and they are content that judgment be recorded against them, although technically they do not consent to it so as to preclude themselves from appealing, if it is wished to take the opinion of a higher tribunal. The result is that in each action judgment will be entered for the defendants.

BRETT, L.J. In the first of these actions it seems to me that two questions arise, first, whether the judgment of my Brother Lindley can be supported on the grounds which he has assigned; and secondly, whether it can be upheld for other reasons. With great deference to him, and after much hesitation, I have clearly come to the conclusion that the judgment of my Brother Lindley cannot be supported for the reasons upon which it is founded. Those reasons are that Burge & Co., supposing themselves to have become transferees of the stock, which really belonged to

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 5 Ex. 111.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

BRETT, L.J.

Coates, mortgaged it to Simm and Ingelow representing the National Bank, and that a certificate was issued by the company which asserted that Simm and Ingelow were the holders of the stock, and consequently that an estoppel existed against the company in favour of Simm and Ingelow or the National Bank. Pausing here, I may say that I think it clear upon the authority of *In re Bahia and San Francisco Ry. Co.* (1), that the certificate issued by the company, being acted upon by Simm and Ingelow, did raise an estoppel between them. My Brother Lindley, however, proceeded to hold that, inasmuch as this estoppel existed in favour of Simm and Ingelow as against the company, there was a title by estoppel to the stock, and that when Simm and Ingelow ceased to be mortgagees upon the advance being paid off, they became trustees of the stock for Burge & Co., who may rest upon the title passing to them as cestui que trusts of Simm and Ingelow. With great deference, it seems to me that my Brother Lindley has given a wrong interpretation to the phrase, that Simm and Ingelow had a title by estoppel. The doctrine of estoppel was recognised in the Courts of Common Law just as much as it was in the Courts of Equity, and it seems to me that an estoppel gives no title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances. I speak not of that estoppel, which is said to arise upon a deed of conveyance or other deed of a similar nature. I incline to think that when the word "estoppel" is used with reference to deeds of that kind, it is merely a phrase indicating that they must be truly interpreted. I am speaking now of the estoppels which arise upon transactions in business or in daily life, and, as it seems to me, these estoppels have no effect on the reality of the transaction. It may be that under some circumstances an estoppel will prevent a person from dealing in a particular manner with goods; for instance, if a person is estopped from denying that he has made a contract to deliver goods, and if the goods are still in his possession, in a suit to enforce performance of the alleged contract he may be obliged to hand over the goods, although, in fact, there was no contract,

(1) Law Rep. 3 Q. B. 584.

and he may be liable to act as if there had been a contract, and to fulfil his supposed obligation. But suppose that although a person is estopped from denying that he has made a contract to deliver goods, he has parted with the goods and has sold them to somebody else: it seems to me that although he may be estopped as against the person claiming delivery under the supposed contract, he cannot be compelled to deliver the goods, which, there being no contract, have legally passed to somebody else: owing to the estoppel he cannot deny that a contract was entered into, but he cannot fulfil it by delivering another person's goods; and therefore the only remedy against him is that he shall pay damages for not delivering the goods. In a similar manner a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up, if he has them in his possession and under his control; but if the goods, in respect of which he has estopped himself, really belong to somebody else, it seems impossible to suppose that by any process of law he can be compelled to deliver over another's goods to the person in whose favour the estoppel exists against him: that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him, he can recover only damages. In my view estoppel has no effect upon the real nature of the transaction: it only creates a cause of action between the person in whose favour the estoppel exists and the person who is estopped.

Apply these principles to the present case. For a time an estoppel existed in favour of Simm and Ingelow, representing the National Bank, because the telegraph company had issued a certificate stating that the stock was then the property of Simm and Ingelow, and the National Bank had acted upon that certificate. In my opinion if Simm and Ingelow could have shewn that damage had accrued to the bank from the issuing of the certificate, they might have maintained an action against the telegraph company; but so soon as Burge & Co. had paid off the advance made to them by the National Bank, the bank was no longer in a position to suffer damage from the issuing of the certificate, and no action upon the ground of estoppel could be maintained for its benefit. The

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Brett, L.J.

only persons who could have availed themselves of the estoppel were Simm and Ingelow, and that estoppel did not give them any legal title to the stock, as my Brother Lindley has supposed; it only gave them for a time a right of action against the telegraph company, and therefore when they themselves could not maintain an action, it is wrong to say that they could transmit a right of action to Burge & Co. The latter cannot maintain this suit upon the ground that the company were at one time estopped as against Simm and Ingelow, when at the time of bringing the action no estoppel existed between them and Simm and Ingelow. With great deference, therefore, I cannot agree with the grounds upon which the judgment was founded.

It may be argued, however, that the judgment can be supported on other grounds. If Burge & Co. are to be considered as the only plaintiffs, I come to the conclusion, upon two grounds, that no estoppel exists in their favour against the telegraph company; first, because in point of fact no representation sufficient to raise an estoppel was made by the company to Burge & Co.; and secondly, because even if a representation upon which an estoppel might be founded was made, that representation caused no substantial alteration in the position of Burge & Co.

As to the first ground, Burge & Co. supposed that they had bought stock through a broker upon the Stock Exchange; they received a transfer supposed to be signed by Coates, and a certificate from the company that Coates was the holder of stock. They sent the transfer to the company in order that the names of their nominees might be put upon the register, and then the company did that which is said to be the ordinary course, namely, they sent a letter to Coates requesting to know whether he had authorized the transfer of the stock. That letter was intercepted by a fraudulent clerk, so that the company received no answer to it, and they therefore supposed that Coates had agreed to transfer his stock, and upon that they registered Skinner and Spurling as the holders, and afterwards they issued a certificate to Simm and Ingelow, stating that they were the holders of the stock. The only fact relied upon as raising an estoppel is the issue of that certificate. It has been argued that this certificate amounts to a representation, although no representation was made in words on

behalf of the company. At the time Burge & Co. bought the stock on the Stock Exchange they did not rely upon anything said or done by the company; they trusted wholly to the broker through whom they purchased, and that broker is personally liable to them by reason of the course of business, and perhaps by the rules of the Stock Exchange; they relied entirely upon him; they paid the price to him upon the faith of a transfer which he alleged that he had obtained from Coates, and not upon the faith of anything done by the company. If Burge & Co. paid the price upon the faith of the former certificate issued to Coates, that certificate is perfectly true, and in it no false representation was made by the company. Nothing in that transaction can possibly raise an estoppel in favour of Burge & Co. against the defendants. After they had paid the money, they sent the transfer to the company in order that they might induce the company to put the names of their nominees upon the register, and thus complete their title. It is true that it is the course of business for the company to make inquiry of the person whose name is upon the register, but it seems to me that they are under no obligation to the person who sends the transfer to make that inquiry; it is obvious that they make it entirely for their own protection. I can see nothing which casts a duty upon them to make that inquiry on behalf of the alleged transferees; in truth the intending transferees, if they distrust the broker, can require to be informed of the name of the person whose stock is to be eventually transferred to them, and they can themselves make inquiry and ascertain from him whether the broker has his authority to transfer his stock. It seems to me that all the circumstances which are supposed to have entitled Burge & Co. to have the names of their nominees put upon the register of the company, and to obtain a certificate, lay as much within the knowledge of Burge & Co. as within that of the company: at all events they have the same power and duty to make inquiries as the company, and indeed some of the facts are more within the knowledge of Burge & Co. than of the company; as, for instance, it is Burge & Co. who knew what the contract was, and whether it was a contract to transfer. Under this state of facts the company did that which, if the transfer had been valid, would have made Burge & Co. stockholders—in other words, the company

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Brett, L.J.

accepted their nominees as fit to be put upon the register: this, however, was done mainly upon the statement, that the nominees had received a transfer from Coates. The certificate which the company issued to Simm and Ingelow did not contain a statement of anything which Burge & Co. did not know: it did not contain a statement of a transaction or of facts which must be known to the company, but were not known to Burge & Co., and with regard to which any statement of the company was to have an effect upon their conduct: the contract had been concluded before the certificate was issued, upon which alone the estoppel is alleged to arise. As I have already intimated, the certificate declaring Simm and Ingelow to be stockholders was issued not for any purposes of the company: it is obvious that the only use of the certificate in the hands of Simm and Ingelow was to empower them to transfer the stock, or to enable them by producing it to shew to an intending buyer that they had been admitted as members of the company—in other words, that certificate declaring Simm and Ingelow to be upon the register was issued in order that they might hand over the stock to a subsequent purchaser. That certificate would raise an estoppel against the company in favour of a subsequent purchaser from Simm and Ingelow acting for Burge & Co., because by that certificate the company have made a statement of facts which must be taken to be known to them, and cannot be known to a subsequent purchaser, and because the certificate was issued in order that a subsequent purchaser might act upon it. These facts fall within the well-known principles of estoppel. To my mind, however, a person buying from Burge & Co. would have no title to any stock: he would not be a stockholder in the company: he would not be entitled to have stock delivered to him by the company: his only remedy would be in damages. And, whatever may be the rights of a purchaser from Burge & Co., no representation was made by the company to Burge & Co. upon which the latter acted. It is not necessary to consider it, but I doubt much whether any representation was made by the company which could raise an estoppel, even if Burge & Co. had acted upon it: for it seems to me that neither of them made any representation in order that it might be acted upon by the other party.

As to the second ground, I think it right to say that, even if there was a representation by the company to Burge & Co., their substantial and legal position has not been altered by that representation, and that there being no alteration of circumstances by reason of that representation, there can be no estoppel against the company. But it seems to me that if a representation was made by the broker who sold to Burge & Co., they had a right of action against him, and that remedy exists just as much at this moment as at the time when the representation was made. It is possible that Burge & Co. might have had some remedy under the rules of the Stock Exchange. If the remedy created by the law remains intact (and by supposition of law that is a perfect remedy), I doubt very much whether the loss of the remedy under the rules of the Stock Exchange would be sufficient to raise an estoppel; but it seems to me that Burge & Co. now have the same remedy under the rules of the Stock Exchange as they had at the moment of the company registering Spurling and Skinner, and therefore that the position and the legal rights of Burge & Co. are not in any way altered. They have their claim for breach of contract against the broker who sold to them; they have the same remedy against that broker under the rules of the Stock Exchange which they had before, and if nothing could have hindered them from availing themselves of that remedy upon discovering at the time the nature of the transaction, nothing prevents them from availing themselves of it now. It has been further argued that Burge & Co. have been put to rest as to their remedy. Possibly they have been put to rest, but it seems to me that that is not sufficient: it must be shewn not only that they have been put to rest, but also that they have been damaged by being put to rest. I can understand that it may be held that if a person is put to rest by a representation, and if by the delay in enforcing his remedy he suffers damage, he has the same rights as if his position had been altered at the time of the representation; for instance, if a representation had been made by the company, and if Burge & Co. had been put to rest as against the broker who sold to them, and if between the time when they were put to rest and the time when they resolved to act the broker had become insolvent, they would have suffered damage, and the case would

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Brett, L.J.

have fallen within *Knights* v. *Wiffen* (1), and they might be entitled to recover. I do not, however, think it necessary to say whether an action by them would be successful under these circumstances. At present I do not venture to differ from *Knights* v. *Wiffen* (1); I understand that the learned judges construed a certain statement as having not merely its ordinary meaning, but also a mercantile meaning, and they were of opinion that the mercantile meaning of the statement was that the defendant had sold the goods separated from other goods and held them for the benefit of the plaintiff. I confess it seems to me that in that case two well-known doctrines were mixed up, the doctrine of estoppel, and the doctrine of attornment by a warehouseman who has goods in his hands. But in any point of view *Knights* v. *Wiffen* (1) does not govern this case, even if the company did make a representation, and even if the doctrine as to putting another person to rest be true; for in the present case there is no evidence that Burge & Co. sustained damage by being put to rest.

I have stated my views at length, but the case is important, and I have thought it right to point out what are the reasons, which have convinced me that the judgment of Lindley, J., cannot be supported either on the grounds assigned by him or on any other grounds. In my opinion there was no estoppel between Burge & Co. and the telegraph company, and our judgment ought to be for the company.

It is unnecessary to say anything as to the action brought by the telegraph company.

COTTON, L.J. In this case we have the misfortune to differ from Lindley, J., and I think it right to say at starting that he appears to have delivered not a considered judgment but a judgment immediately after the case had been heard in order to prevent delay: therefore he had not had leisure to review the case in all its aspects. The first action is founded upon the supposition that as against the company the plaintiffs are entitled to be treated as stockholders, and it is brought on the ground that the company have denied to them the rights of stockholders. When the real facts are ascertained, it is clear that independently of the question

(1) Law Rep. 5 Q. B. 660.

of estoppel, the action cannot be maintained; for the title of Simm and Ingelow has its origin in a forged transfer from one Coates. The stock which they claim is still at law and in equity vested in Coates, and he alone is entitled to be registered as the holder of it. But it has been urged that by the doctrine of estoppel the plaintiffs are to be deemed the owners of it, and the question has been argued as if Burge & Co. were the only plaintiffs; I will, therefore, deal with the case upon that footing. I will first consider what is the meaning of the words "title by estoppel" or if that phrase be objected to, "right by estoppel." As I understand, it means that where one person makes to another a statement which is afterwards acted upon, in any action afterwards brought upon the faith of that statement by the person to whom it was made, the person making it is not allowed to deny that the facts were what he represented them to be, although in truth they were different. It has been contended that upon this doctrine Burge & Co. had a right of action against the company, and reliance has been placed upon *In re Bahia and San Francisco Ry. Co.* (1), and *Hart* v. *Frontino, &c., Gold Mining Co.* (2), but they were in truth very different. In the present case certain persons on behalf of Burge & Co. took to the company a transfer purporting to be executed by Coates: he was in fact a stockholder, but the transfer was a forgery, and the question is whether the company by issuing a certificate of registration to Simm and Ingelow, the nominees of Burge & Co., in any way made a representation, which prevents them from now saying that Simm & Ingelow are not the owners of the stock. I need only refer to the first of the two cases which I have mentioned, in order to shew how different they are from this: there the persons making the application were not in the position of Burge & Co., but were in the position of a person who might have bought the stock in open market from the nominees of Burge & Co., and might have paid the price upon the faith of the certificate of registration issued by the company. To a buyer who did not know the real facts, the certificate would amount to a representation that the sellers were entitled to the stock, and under the doctrine of estoppel the buyer might maintain an action against

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 5 Ex. 111.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Cotton, L.J.

the company, not as the real owner of the stock, but as a person whom the company were bound to treat as the real owner, because they had stated to him that the sellers to him were the real owners and that the transfer to the sellers was valid. But the facts here are very different. Burge & Co. are driven to admit that Coates was the registered owner, and that he did not execute a transfer of the stock to them; but they contend that the company is estopped from denying that Coates did transfer the stock to them. Why ought the company to be estopped? All that occurred was that a transfer purporting to be executed by Coates was brought to the company's office: Burge & Co. and the company had at least equal means of knowing whether the transfer was genuine. It was argued that as the company are bound to keep a register, they are bound to ascertain whether a transfer brought to them is a forgery, and that by issuing the certificate they must be taken to have made a representation as to a matter within their own knowledge, and must be considered to have represented to Burge & Co. that the transfer was genuine. Even if this duty exists, the real question is whether it exists towards Burge & Co., because if it does not exist towards them, I cannot think that the fact of there being a duty towards someone else to inquire, makes the acceptance of the transfer brought by Burge & Co., a representation to them by the company that it was a genuine document. In fact the use of the word "duty," is an indirect mode of saying that if the company accepts a forged transfer they will be liable to a person innocently bringing it, and it is clear that they would be equally liable according to that view whether or not they did make inquiries. The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense, that unless the company act upon a genuine transfer, they may be liable to the real stockholder. There being in my opinion no duty between Burge & Co. and the company to make inquiries, I think that there was no representa-

tion by the company to Burge & Co. that the transfer was genuine: as it seems to me, the action cannot be maintained upon that ground. It is unnecessary to determine whether, if any representation had been made, Burge & Co. could be considered to have acted upon it.

I must proceed to deal with the view upon which Lindley, J., seems to have chiefly based his judgment, namely, that Burge & Co. are to be treated as the parties beneficially entitled to the stock in the names of Simm and Ingelow. It has been argued that as Simm and Ingelow once had a good title by estoppel, it still remains, because it is impossible to say at what time that title by estoppel came to an end. Simm and Ingelow were purchasers for value; and no doubt while their interest remained they had a right of action against the company, who were estopped as against them from saying that their transferors, Spurling and Skinner, were not stockholders. The action would have been founded upon a representation made to Simm and Ingelow by the company of circumstances, which, if true, would have entitled them to maintain an action as stockholders. But the learned judge appears to have considered that a real title by estoppel existed in Simm and Ingelow, and that that title could be transmitted to Burge & Co., or at least be held for the benefit of Burge & Co., the persons actually interested. Simm and Ingelow having been paid off, have suffered no prejudice from the representation made to them by the company, and I do not think that they have transmitted their title to Burge & Co. As I understand the question, a good title by estoppel may exist in some cases: for instance, by indenture a lease for years may be granted of land in which at the time the lessor has no interest, but if he afterwards acquires a sufficient interest to support the lease, by estoppel it becomes valid for the term created and the lessee has a good title to the subject-matter of demise. There may be also a good title by estoppel to things which do not require any instrument to transfer them, as for instance, goods: if an action is brought upon the ground that the property in goods has passed to the vendor of the plaintiff, and if that question depends upon whether a particular parcel of goods has been set apart and appropriated to the contract

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Cotton, L.J.

between the vendor of the plaintiff and the defendant, an admission by the defendant, the owner of the goods, that there had been a setting apart of the goods, would be effectual as against him to pass the property in the goods to the plaintiff's vendor: as against the plaintiff who has paid for the goods, the defendant is estopped from denying that the goods have been set apart, and the plaintiff is entitled to rely upon the admission of the defendant, which if true would have given the plaintiff a good title to the goods. A case of that description is *Knights* v. *Wiffen*. (1) In the present case, however, we are dealing with stock, which cannot be transferred except in a particular manner, and to which the company cannot give an actual title by any admission of their own. If stock is sold, the buyer can only gain title to it by an instrument executed in the manner required by the articles of association. No right can be acquired by estoppel to any specified portion of stock, except where the owner has represented that which in a Court of Equity he may be bound to make good. The only right by estoppel which can be gained against the company is a right of action founded upon statements by the company, which if true would have entitled the plaintiff to be registered as stockholder. If Simm and Ingelow had sold in the market the 5000*l.* stock belonging to Coates, an innocent purchaser would have acquired a title by estoppel against the company; not because Simm and Ingelow had transmitted to him any title of their own, but because he had acted upon the faith of the representation made by the company in issuing the certificate: he would have had a right in consequence of that statement to maintain an action against the company, as if the statement upon which he acted had been in fact true. In the present case, however, Simm and Ingelow have not sold to any one, and, in my opinion, no representation was made by the company so as to give Burge & Co. any right against them under the doctrine of estoppel, and the latter cannot gain that right, on the ground that Simm and Ingelow were the holders of the stock, and before they parted with their interest had the right to maintain an action against the company if their title should be denied.

(1) Law Rep. 5 Q. B. 660.

1879

SIMM v. ANGLO-AMERICAN TELEGRAPH COMPANY.

ANGLO-AMERICAN TELEGRAPH COMPANY v. SPURLING.

Cotton, L.J.

As regards the second action, it is to be understood that no opinion is expressed in favour of either party.

In *Simm and Others* v. *Anglo-American Telegraph Co.*

Judgment reversed and entered for defendants.

In *Anglo-American Telegraph Co.* v. *Spurling and Others.*

Judgment affirmed.

Solicitors for the Anglo-American Telegraph Co.: *Bircham & Co.*

Solicitors for Burge, Brown, and Dennis, and for Simm and Ingelow: *William Tatham & Sons.*

Solicitors for Spurling and Skinner: *Vandercomb, Law, & Hardy.*

THE SOUTH EASTERN RAILWAY COMPANY *v.* THE RAILWAY COMMISSIONERS, &c., THE MAYOR, ALDERMEN, AND BURGESSES OF HASTINGS.

1880
Jan. 13.

Railway Company—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48)—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 3—"*Facilities*" *for receiving, forwarding, and delivering of Traffic—Order for Railway Company to erect or alter Stations and other structural Works—Railway Commissioners—Jurisdiction.*

The Railway Commissioners appointed under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), are not entitled in the execution of the provisions of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), ss. 1, 2, 3, to make orders directing railway companies, for the better accommodation of the public, to erect or enlarge stations and other structural works. So *held*, by Cockburn, C.J., and Manisty, J. (Lush, J., dissenting.)

Application having been made to the Railway Commissioners for an order requiring a railway company to enlarge their station at the town of H., and to provide better booking office, waiting room, refreshment room, and general accommodation therein; to lengthen and deepen the existing platforms of the station, and to provide additional platforms; to provide better warehouse accommodation for goods at the station; to provide better pens at the same station, and additional sidings for cattle trucks; to enlarge the platform of the station at the town of S. L., and to provide that station with a new approach by a direct route—the Commissioners made or proposed to make orders to the effect that a substantial addition should be made to the area of the covered platform at H.; that the yard should be so arranged as that carriages might set down and take up under cover; and that the company should provide at H. two general and first-

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

class waiting rooms, each at least twice as large as the largest of the then present rooms, and should reserve also part of their buildings for refreshment purposes:—

Held, by the majority of the Court (Cockburn, C.J. and Manisty, J., Lush, J., dissenting), that upon the true construction of the words of 17 & 18 Vict. c. 31, s. 2, requiring railway companies "to afford all reasonable facilities for the receiving, and forwarding, and delivery of traffic upon and from the several railways worked by such companies respectively;" such facilities could not include structural accommodation, and that the Railway Commissioners had no jurisdiction to entertain an application for an order for the structural erections and alterations in question; that their orders were invalid, and a prohibition must be granted.

By Lush, J., dissenting, that the word "facilities" must be taken in the case of railways to include suitable stations and platforms, and that the Commissioners had jurisdiction to entertain the application and to make the orders, except the order to provide a refreshment room, that is, a room in which the company were to provide refreshments.

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DEMURRER to a declaration in prohibition raising the question whether the Railway Commissioners appointed under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), were entitled in the execution of the provisions of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), to order the defendant company to construct various specified works for the accommodation of the public.

1879. Dec. 19. *Sir H. Giffard, S.G.* (*A. L. Smith*, with him), for the Railway Commissioners, in support of the demurrer, referred to the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), ss. 1, 2, 3, and contended that these sections authorized the Commissioners to make an order for the accommodation in question. He cited *In re Caterham Ry. Co.* v. *London and Brighton Ry. Co.* (1), and the observations of Cresswell and Willes, JJ., upon the fourth ground of complaint in that case. *In re Oxlade* v. *North Eastern Ry. Co.* (2) (as to the inquiries directed by the Court), *West* v. *London and North Western Ry. Co.* (3)

J. P. Murphy, Q.C. (*F. M. White, Q.C.*, and *H. R. M. Jones*, with him), for the corporation of Hastings.

Littler, Q.C. (*W. Willis, Q.C.*, and *A. M. Bremner*, with him),

(1) 1 C. B. (N.S.) 410; 26 L. J. (C.P.) 161.

(2) 1 C. B. (N.S.) 454, at p. 478; 26 L. J. (C.P.) 129.

(3) Law Rep. 5 C. P. 622.

3 Jur N.S. 637

for the South Eastern Railway Company, contended that 17 & 18 Vict. c. 31, ss. 1, 2, 3, were merely designed to secure for the public a reasonable use of railways as constructed under the powers of their special Acts respectively, and to prevent any unfair preference of particular persons, and that it was never meant to enable the Commissioners to impose upon such companies the construction of new works involving the outlay of large sums of money. He referred to *Baxendale* v. *Great Western Ry. Co.* (1) and *Bennett* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2)

Sir H. Giffard, S.G., in reply.

Cur. adv. vult.

The facts and arguments are more fully referred to in the judgments.

1880. Jan. 13. The following judgments were delivered:—

COCKBURN, C.J. This was a demurrer to a declaration in prohibition, made by the direction of this Court, on an application of the South Eastern Railway Company for a writ of prohibition to the Railway Commissioners and the Town Council of Hastings, prohibiting them from proceeding further in the matter of an application by the Town Council to the Railway Commissioners, under the Railway Traffic Act of 1854, and the Railways Regulation Act of 1873, for an order on the plaintiffs, the railway company, to execute certain works at their stations at Hastings and St. Leonards, in order to afford proper facilities for receiving, forwarding, and delivering, the traffic at those stations. The facts on which the application was founded were these:—

The South Eastern Railway Company are the proprietors of a line of railway from London to Hastings and St. Leonards, and have stations for passengers and goods at both these places. The London, Brighton, and South Coast Railway have also a branch from their main line to Hastings; and by an arrangement with the South Eastern Company, sanctioned by parliament, the London, Brighton, and South Coast Company run their trains to the stations of the South Eastern Company, and use these

(1) 5 C. B. (N.S.) at p. 309. (2) 6 C. B. (N.S.) at p. 707.

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

stations for the purpose of their traffic. These stations having been built many years since, and the traffic having largely increased, the stations have become altogether inadequate to its requirements. Under these circumstances the Town Council, as representing the inhabitants, applied to the Railway Commissioners for an order on the plaintiffs in prohibition to execute the following works: As regards the Hastings station, 1. to enlarge the station and provide better booking office, waiting room, refreshment room, and general accommodation therein; 2. to lengthen and deepen the existing platforms, and to provide additional ones; 3. to provide better warehouse accommodation for goods; 4. to provide cattle pens and additional sidings for cattle trucks; as regards the St. Leonards station, to enlarge the platform, and to provide a new approach to the station by a direct route.

It appears from the declaration that the plaintiffs put in an answer to the application of the town council, in which they denied, as matter of law, the jurisdiction of the Commissioners to hear and determine the application, or to make the order, or grant the relief therein prayed for, or any part thereof. The Commissioners, nevertheless, entered on the inquiry, and after hearing witnesses on both sides, pronounced judgment, abstaining, however, from making any definitive order for a period of two months, with a view to afford time for an arrangement for co-operation between the corporation and the railway company, with liberty to either party to apply to them in the interval. The judgment is set out in the declaration, and it appears from it that the Commissioners are prepared to make an order on the railway company to execute, in substance, the works specified in the application of the Town Council.

In order the better to appreciate the question to be determined it may be expedient to follow the judgment in some little detail. The Commissioners deal first with the enlargement of the Hastings station. "Two things," they say, "that are urgently required are additional ground for the purpose of giving a more extended area to the station, and the widening of the bridge by which the trains from the south coast and the trains from Tunbridge Wells enter the station, and which at present is only wide enough for two lines of rails." After entering on the merits of the question,

they say, "We cannot doubt that with the traffic of the two companies in and out of Hastings, so large as it is, and every year becoming larger, it is necessary that the South Eastern Company should find means to extend the limits of their station."

The meaning of this language is ambiguous. It may mean that the Commissioners are prepared to make an order on the company to apply to parliament for additional powers, or it may amount to no more than a recommendation to them to do so. If it means the former there can be no question as to its being ultra vires.

The judgment next deals with the widening of the bridge; but an arrangement having been come to pending the inquiry between the company and the trustees of an adjoining estate, from whom it was necessary to obtain land, and with whom there had been previously a disagreement as to terms, and the bridge being now, in conformity with the agreement thus come to, about to be widened, the Commissioners, though they do not expressly say so, do not appear to contemplate making an order in respect of widening the bridge, which, but for this arrangement, it appears they would have been prepared to do.

The Commissioners next deal with the platform accommodation. After showing that the two existing platforms are insufficient for the traffic, they mention that a plan has been submitted to them on the part of the company for an enlargement of the platform area, to the extent of 2000 yards, and for the addition of a third platform. They wind up by saying "Our order will require the company to extend the platform accommodation in the degree which has been admitted to be necessary, and which the plan of the company's engineer shews can be provided without difficulty, now that the bridge is about to be made wide enough at least to carry four lines of rails."

The Commissioners next deal with "the complaint that passengers are not sufficiently protected from the weather," and with the suggestion of the corporation that "there should be a roof over all the platforms, and also over that part of the station yard where carriages draw up." With respect to this they say, "We think, that considering the exposed position of the station, and that Hastings is a place of resort for invalids, there is not shelter

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

as things are; and we shall order a substantial addition to be made to the area of covered platform, and the yard to be so arranged as that carriages may set down and take up under cover."

The complaint as to "the absence of proper waiting rooms" is next considered. After pointing out the deficiency in this respect, the Commissioners say, "The company admit in fact that the accommodation in question is not sufficient, by proposing in the plan to which we have referred to increase its superficial area by 2300 feet. How that additional area would be arranged by them internally was not disclosed in the evidence; but we shall feel it necessary to require the company to provide two general, and two first class, waiting rooms, each at least twice as large as the largest of the present rooms, and to reserve also part of their buildings for refreshment purposes." Lastly, the Commissioners determine that in the booking office there shall be more than one window for the delivery of tickets.

Having thus disposed of the complaints relating to the passenger traffic, the Commissioners proceed to deal with the complaints as to the goods traffic, which are confined to the small size of the goods shed, and the short supply of sidings with roads alongside for carts to get to the trucks to unload traffic waiting for delivery. The Commissioners are of opinion that additional sidings are required. They pronounce the size of the shed to be too small; but as it could only be increased by space taken from the goods yard, from which none could be spared, they refrain from making any order for its increase, but add that, "as a goods yard cannot dispense with accommodation of the sort on a proper scale, it becomes almost imperative upon the company to seek for powers to make that yard large enough to include it." Here, again, this last observation leaves us in uncertainty whether the Commissioners propose to include in their order, when made, an injunction to the company to apply to parliament for power to acquire additional land for the purpose of enlarging their yard.

It next appears that there are weekly consignments of live stock brought to Hastings, but there are no cattle pens at the station, and though a raised platform intended for a cattle dock has been erected, it is used for the coal traffic. The Commis-

sioners require that cattle pens shall be supplied, and that the structure shall be restored for its original use.

The complaints as to the St. Leonards station are of a similar character. The two platforms are pronounced to be insufficient in point of size, as also in point of covered accommodation. The lines are crossed by a bridge, and the bridge is not covered over. The waiting-rooms, two in number, but one of which is also used as a ticket office, are pronounced to be too small. All these defects are to be remedied. Besides the present small rooms, there are to be "not less than two good sized waiting-rooms on each side of the line."

Here, again, there being but one window for the issue of tickets to the three classes of passengers, the Commissioners are prepared to order that there shall be three.

The last head of complaint connected with this station seems more especially to exhibit the extent to which the authority of the Commissioners is proposed to be carried. "The other principal complaint regarding the station," say the Commissioners, "is that the company have not laid out a yard outside their down or arrival platform large enough for flys and carriages to turn round in, and that they refuse to connect their station road on that side with some new streets abutting upon it; and it is said that a populous district north and north-east of the station would be much approximated to it if the company would only remove their fence and allow ingress and egress by these streets. But the company allege that their road is some feet below the level of the streets, and that the break between the two makes it impossible to give a through passage with a gradient on which a carriage could work without at least beginning the incline in their cab yard, and thus, as they say, still further diminishing the adaptedness of that yard for station purposes. They also object to their station road being made into a public thoroughfare. It is not, they say, sufficiently wide for a public street, and any general use of it would interfere with the station traffic."

After considering the merits of the question the Commissioners say: "The view we take of this part of the case is that the railway company ought to give their consent to the proposed openings into their approach road, as also to such widening of that road

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

if required, as the limits of their property will admit, provided that the public road authorities agree in consideration thereof to do the junction work and the work of widening the road, subject to the approval of the company's chief engineer, and to defray all the expenses of such works (any disagreement that may arise *being referred to us for decision*), and provided, also, that they agree that the company shall have the right at any time of requiring them to take over the approach road and to form and maintain it as a public road."

It thus appears that the Railway Commissioners have entertained an application for an order to the railway company to execute structural works of an extensive character, and contemplate issuing such an order; and the question raised on this record is whether such an order is within their authority, as conferred by the two Acts to which I have referred. This depends on the construction to be put on s. 2 of the first Act, the 17 & 18 Vict. c. 31. That section is as follows:—

"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company, and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as

aforesaid, and so that no obstruction may be offered to the public desirous of using such railway or canal, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

By the third section jurisdiction is given in case of "any complaint of anything done or omitted in violation or contravention of the Act," in England to the Court of Common Pleas, in Ireland to any of the superior Courts, in Scotland to the Court of Session, or to any judge of such Courts, to hear and determine the matter of such complaint, and for that purpose to prosecute any inquiry the Court may deem necessary by engineers, barristers, or other persons; after which the Court may "issue a writ of injunction or interdict restraining the company from further violation or contravention of the Act and enjoining obedience to the same." Obedience may be enforced by attachment or by the infliction of a fine of 200*l.* a day.

By the Railways Regulation Act of 1873, 36 & 37 Vict. c. 48, the jurisdiction thus given to the courts is transferred to the Railway Commissioners, but the authority is carried no further, and must be sought in the construction to be put on the earlier statute.

Two views of the most opposite and conflicting character were pressed upon us on the argument. On the part of the plaintiffs in prohibition it was contended that the sole purpose and effect of the Railway Traffic Act of 1854 was to insure equal accommodation being afforded to all persons, or classes of persons, in the conveyance and delivery of goods, and to prevent any undue preference being given to one, to the prejudice or disadvantage of another; or that, at most, its purpose was to insure effective management in the details of the traffic and the best arrangements for the speedy and safe carriage and delivery of passengers and goods; while, on the part of the defendants, it was contended that it was competent to the commissioners, with a view, to afford facilities to traffic, not only to regulate the working of the railway in all its details, as in directing the number of trains, the class of carriages, or the like, but also, where structural

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

accommodation was needed for the traffic, to order a railway company to enlarge, alter, or erect structural buildings, such as stations, platforms, bridges, warehouses, sheds; or to alter the internal arrangements of a station with reference to the number size or position of its waiting or refreshment rooms; or to make or enlarge yards; or to make or alter roads or approaches to stations, or even to lay down additional lines of rails; in short to do anything which should appear to the Commissioners reasonable with a view to the requirements of the traffic—with one limitation only, namely, that the thing ordered to be done should be within the powers and the means, including herein the pecuniary means, of the company. For it was admitted on the argument as beyond dispute—though from the judgment of the Commissioners it may be doubted whether such is their view—that the Commissioners could not compel a railway company to apply to parliament for fresh powers to enable them to carry out an order made by them. But with this single limitation a plenary and absolute authority was asserted on the part of the Commissioners, whenever the question of facility to the traffic was concerned, and the thing required to be done was in their judgment reasonable, to direct and control railway companies in the government and management of their property and the conduct of their affairs, from the minutest details of the management and the working of the traffic to the structural organisation of the railway and its accessories, however great the work or costly the expenditure. Indeed the Solicitor General, in arguing for the defendants, even went so far as to maintain that if a company, laying down a railway with a single line of rails, had taken power to raise money and lay down a second line, and the traffic was sufficient to call for it, the Commissioners would have authority to order the company against their will to raise the money and lay down such second line of rails. Nay, if the argument is to be carried logically into all its ulterior consequences, I can see no reason why, if it is to prevail, it will not be competent to the Commissioners in the interest of the traffic to reduce the tolls on a railway to their minimum, and thus to take this most important part of their business out of the hands of a company.

The question raised on the record, and with which we have

to deal is, whether the Railway Commissioners have authority to entertain an application for such an order for structural erections and alterations as is asked for by the corporation of Hastings, and, as appears from the judgment thus provisionally pronounced, the commissioners are prepared to make.

It is greatly to be regretted that, in a matter of so much importance, the legislature should have made use of phraseology so uncertain and indefinite as the language of the second section of the Act of 1854, in the use of the term "facilities for receiving, forwarding and delivering traffic," which, while its more obvious meaning would appear to have reference to the arrangements to be made for the convenient working of the traffic, and the management of the details necessary thereto, may by a strained interpretation be taken to comprehend the construction of the railway itself and of every thing connected with it; though I agree with the learned counsel for the plaintiffs that the word is an inapt word for such a purpose, and one which the legislature is not likely to have employed to confer a power so vast and unlimited, especially when interfering with vested and most valuable rights, which, as I shall presently show, must follow from the exercise of the power now asserted.

But besides the argument which arises from the inaptness of the phraseology of the section with a view to the creation of so important a power, there are, as it seems to me, several grounds for thinking that parliament cannot have intended to confer such an authority and jurisdiction as that which the Railway Commissioners now claim to exercise.

In the first place such legislation would have been wholly inconsistent with the course previously adopted by parliament in granting to companies powers to construct works of a public character, such as canals, harbours, docks, railways and the like, in which, owing to interference with private rights of property, statutory powers are necessary, and in which, owing to the advantages which accrue to the public from such undertakings, parliament deems it right to grant such powers, but in granting them imposes specific duties and obligations on the company for the benefit of the public. In all these cases the course has been for the legislature expressly to declare the

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

duties and obligations which it thinks proper to impose on the company—whether for the protection of those whose rights are interfered with, or in the interest of the public—as the consideration for the powers it confers either in the special Act constituting the company, or in some general Act applicable to the subject matter of similar undertakings, and which is incorporated in the former. Beyond doing this, and constituting the company and providing for its government, the course has been to leave the company to manage its own affairs, as any other company carrying on its business as matter of private enterprise would do, subject only to the general law, by which its duties and obligations, either to the public or to individuals, may always be enforced by the appropriate remedies, whether by mandamus, action, or suit in equity; the legislature wisely trusting in great measure to the operation of the motive which is the best security for the public being efficiently served in a matter of commercial enterprise, namely the interest of those concerned in attracting custom by efficient service, with a view to their own profit and advantage.

Like other Acts of a similar character, the Act constituting the South Eastern Railway Company duly provides for the self-government of the company in the appointment of its directors as the governing body, and in the periodical and special meetings of the shareholders; "full power and authority" being given to the directors, "to do all acts whatsoever for carrying into effect the purposes of the Act, and for the management, regulation and direction of the affairs of the company, or relative thereto, except such as are herein required and directed to be done at some general or special meeting of the said company"—thus leaving in the hands of the company and its directors full power and authority to "manage regulate and direct its affairs"—a term which would, I apprehend, beyond all question include the erection or alteration of structural buildings. I observe, too, that among other things which the company are empowered to do for the purposes of the Act, is that of "erecting and constructing such houses, wharves, warehouses, toll-houses, landing places, engines, and other buildings, machinery, apparatus and other works and conveniences, as the said company *shall think proper*,"—here again plainly leaving it to the company

itself to determine what buildings, among other things, will be necessary for the purposes of its traffic. The Railways Clauses Act of 1845, in sect. 16, contains the same provision in the very same terms. It seems difficult to suppose that the legislature can have intended to take away or abridge this right by subjecting it to the discretionary control of the Commissioners, no longer leaving it to the company to do as they "*shall think proper*" in this respect, but making it compulsory on them to act as the Commissioners may think proper.

A difficulty equally great, if not greater, in the way of the authority thus asserted, presents itself if the matter is looked at from the point of view of the financial interests and position of the company. In order to obtain its Act, a railway company has to lay before parliament not only a plan of the line, with a general outline of the works which it proposes to execute, but also the amount of capital it proposes to raise and expend on the undertaking; and it has to satisfy parliament that the capital it proposes to raise will be sufficient to enable it to make the line and execute the necessary works as contemplated in the projected enterprise. The Act then empowers the company to construct the railway, with such buildings, &c., "as the company may think proper"—such being, as I have just pointed out, the express language of the special Acts and also of the general Act of 1845.

The proposed capital having been raised and expended on the line and its accessories, the company has fulfilled its engagements to parliament so far as structural construction is concerned. Its remaining obligation is to maintain the line and its accessories in proper repair and to work the traffic with due regard to the interest of the public and its own. It cannot, justly or reasonably be called upon, unless it desires to do so with a view to its own interest, to enlarge the sphere of the original undertaking, or, against its own will and the sense of its own interest, to invest its earnings in the acquisition of fresh land or the execution of new works involving extensive outlay.

And here a further financial difficulty presents itself. The works having been constructed and the line opened for traffic, the company are entitled to take tolls for the carriage of passengers and goods; and the company, or its directors, as the case may be,

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

are authorized from time to time to declare a dividend out of the net profits of the undertaking. By the South Eastern Company's Act the dividend may go as far as the "net amount of clear profit at the time being in the hands of the company." (Section 108) It is thus left to the company to exercise its discretion as to keeping back any part of the net profits for future additions or alterations. In the later Act, the Companies Clauses Act of 1845, the settling the amount of dividend is left to the directors, who are expressly invested with a discretion as to reserving any portion of the profits for enlarging or improving the works; s. 122 providing that "Before apportioning the profits to be divided among the shareholders, the directors may, *if they think fit*, set aside thereout such sum *as they may think proper*, to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking, or any part thereof, and may divide the balance only among the shareholders." Here again the question presents itself, whether it can have been intended to subject the plenary and absolute discretion thus given to superior control, and so far to take it away. For it is obvious that the right of a company to decide by itself or its directors, whether any portion of its profits shall be applied, not merely to the necessary maintenance and repair of the line and works, which of course must always be defrayed before net profits can be declared, but also to the formation of a fund for affording additional facilities to the traffic of the line by new works, and the right of the shareholders, subject to this discretion, to have the clear profits divided among them according to their share in the capital, becomes seriously compromised by the creation of a power which may order the construction of such works, however costly, whenever those who wield it may be led to think that the requirements of the traffic call for such an outlay. For, the capital of the company having been expended in the existing works, the only fund from which the cost of new works can be defrayed will be the net profit which would otherwise be distributable as dividend, and which, if new stations, such as we sometimes see, are ordered to be built, may absorb anything like a dividend for a considerable time.

Nor are these observations applicable to the South Eastern Railway Company alone. At the time the Act of 1854 was

passed, many of the leading lines of railway in the kingdom had already been opened. Numerous other companies had obtained their Acts, and had raised their capital, and their lines were in the course of construction. Canal Acts had been passed, year after year, for a century. All these Acts contained similar powers of self-government, and secured the right of the shareholder to his share of the net profits, absolutely, or if subject to the reservation of a portion of such profits with a view to the further enlargement and improvement of the concern, subject to it only so far as the company, or its governing body, should determine. It seems to me next to impossible to suppose that parliament, ever disposed to deal tenderly with vested rights, having conceded these powers and rights, as the basis of these great undertakings, could intend, by a sudden blow, to place these companies in a worse position than that of private ones.

Having once made its bargain with a public company, in a matter of commercial enterprise, in the Act by which the company is constituted and its powers are conferred, the legislature could not, unless such a power has been expressly reserved to it, with any consistency or justice, afterwards impose fresh obligations on the company, or deprive it of any of the powers and vested rights the grant of which had been the inducement to undertake the enterprise. Where in the original constitution of such a company, the free and uncontrolled management of its own affairs, especially in respect of its property and pecuniary interests, has been fully conceded, it seems impossible to suppose that parliament would, by an ex post facto law, deprive the company of the power of self-government, and subject it throughout its entire existence, to a controlling power not dreamt of in its original constitution.

It is to be observed that the general Acts relating to these companies which constitute the extensive legislation of 1845, many years later in point of date than the South Eastern Company's Act, are all prospective in their operation, and so thoroughly does it appear to have been understood, at the time of the passing the original Act of the South Eastern Company, that such statutory rights, once given, could not be taken away or abridged without an express reservation to that effect, that, in

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS

Cockburn, C.J.

order to reserve to parliament the right to subject the company to any general Act which might be passed—the passing of such an Act within the next twelve months having, it appears, been then contemplated—that by s. 219 it is expressly provided that nothing in the Act shall be taken to exempt the railroad to be formed under it from the provision of any general Act for the regulation of railroads which might be passed, within a year from the passing of the Act, if parliament should then be sitting, or, if it should not, then before the end of the next session. No such Act, however, was passed.

It may perhaps be said that this reasoning, if sound, would equally apply, though perhaps in a less degree, to the interference, whatever it may be—and there is undoubtedly some—introduced by the Act of 1854. But a material difference exists between the two cases. In the acquisition of the powers granted to a company by parliament, with a view to the public service, there is always the implied condition that, to the extent of the means at the company's disposal, the public service shall be promoted with due diligence, and every one shall be entitled to be served on equal terms. To provide for the discharge of this implied obligation, when it became apparent that railway companies were not always willing to fulfil it, might not—especially if confined to insuring equality and preventing undue preference—amount to an undue interference with the right of managing their own affairs previously conceded to them. That this was the view on which the legislature proceeded cannot I think be doubted. Lord Campbell, in the House of Lords, on the discussion on the bill, expressly declared that the 2nd section imposed no greater duty or liability on railway companies than they were already under by law. It is obviously a very different thing when, the traffic having outgrown the accommodation contemplated in the original scheme, and provided for by the capital which it was authorized to raise, a company is called upon to invest capital, possibly to a large amount, in new stations, or other structural works. For it is here obvious that, the capital of the company having been long since expended on the line and works, as contemplated in the original scheme, the amount to be expended on new works, not so contemplated or provided for, must be found out of income—in

other words, out of what would otherwise be payable as dividend to the shareholders, secured to them as their undoubted right by the Act of Parliament constituting the company, and the want of which as a means of income may to some of them be a very serious inconvenience—an injustice which will be the more sensibly felt if, in the view of the company and its directors, the works ordered to be made are uncalled for.

It being thus, as I cannot but think, beyond question that interference with the self-government and financial management of railway companies once constituted and established would be an interference with vested rights, it seems to me to follow that, while there can be no doubt that parliament, in the plenitude of its legislative power, can deal with such rights, yet that, looking to the tenderness with which vested rights are ever infringed on, any legislative enactment in any way interfering with such rights must receive the strictest construction and be carried no further than the language of the enactment necessarily requires.

The language of the Act therefore becomes of material importance, and, as it seems to me, affords a cogent argument against the authority claimed. For, I cannot bring myself to believe that, if the legislature had intended to undo what it had done, and to take from railway and canal companies the management of their affairs, as previously conceded to them, and as enjoyed by other trading companies, to the extent of compelling them to invest fresh capital, contrary to their own judgment and will, in new works, this would have been explicitly declared in unambiguous language, instead of language far more applicable to the conduct of the ordinary business of a goods department. Moreover, provision would have been made for the financial arrangements which an order of this kind, involving possibly a very considerable outlay, might necessitate. Something, too, I should expect would have been done to reconcile the enactment of the 122nd section of the Companies Act of 1845, which leaves the reservation of a fund for such purposes entirely in the discretion of the directors, and that of the 3rd section of the Act of 1854, which, in case of disobedience to an order made under it, makes the penalty fall, not on the directors, but on the company.

But it is not only that the language of the second section is far

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS. &c.

Cockburn, C.J.

more adapted to "facilities" afforded by the management of traffic than to those arising from the structural accommodation of the premises in which the traffic is carried on: the whole tenor of the enactment seems to me to point in the same direction. The provision as to affording "reasonable facilities for the receiving and forwarding, and delivering of traffic" is associated in the same sentence with that of affording facilities for "the return of carriages, trucks, boats, and other vehicles," and with the prohibition against "giving undue or unreasonable preference," which of course applies not to the traffic of passengers but that of goods, as it is in respect of the latter alone that undue preference ever occurs. Then follows, in the same section, a provision which appears to me of considerable importance as showing the sense in which the term "facility" is employed in the enactment. "Every railway company, or canal company, or railway and canal company, having or working railways which form part of a continuous line of railway, or canal, or railway and canal communication, or which have the terminus, station, or wharf, near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic, arriving by one of such railways or canals, by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid; and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." Now this can mean no more than that the company, to whose railway or canal, forming with that of another company a continuous communication, traffic is brought, shall receive and forward it without obstruction or unreasonable delay, and, it may be, shall make its premises available for the purpose; but it cannot, as it seems to me, in the absence of express provision, be taken to mean that such company shall be, compulsorily, under the necessity of making, at its own expense, structural erections or alterations, in order to afford facilities to the traffic of another and independent line, to which it owes no duty or obligation except such

as the statute thus creates. Yet the meaning of the term "facilities" must surely be the same in both branches of the section.

It does not appear to me to be of much avail in favour of the opposite view to say that the erection of structural buildings is within the term "facilities" as occurring in the Act of 1854. No one can deny that stations, platforms, warehouses, sheds, yards, afford facilities to traffic—though it may perhaps be doubted whether covered platforms, or luxurious waiting-rooms, or arrangements *for the benefit of invalids*, though much to the convenience of the passengers, can be said to afford facility to the traffic, even though that term should be taken to include passengers. The question is, not whether these things may come within the meaning of the term used in its widest and most general sense, but whether they come within its meaning as used in the statute —in other words, whether they come within the spirit and meaning of the enactment. Nor does it advance the argument to say that the statute was intended to be remedial, and therefore should receive a liberal construction. Remedial it was, no doubt; but of what? The Act does not, as remedial statutes generally do, recite the mischief against which its enactments are directed. But it is not immaterial to observe that it professes to be simply "an Act for the regulation of the traffic on railways and canals;" and that its only recital is that "it is expedient to make better provision for *regulating* such traffic"—a title and preamble certainly much more in keeping with provisions for directing the management of a goods department and the details of the traffic than the erection of stations, wharves, or other structural accessories of a railway or canal. In the absence of any express declaration of its purpose, what the Act is intended to remedy must, therefore, be sought in its provisions; and these we find to relate to unreasonable delay or obstruction in the working of the traffic, to undue preference, and to the want of harmonious co-operation between different companies with respect to continuous communication. There is nothing in the 2nd section which directly or indirectly points to structural accommodation. Nor, indeed, had any inconvenience in this respect, or complaint of it, arisen at the time the Act was passed. The railway system was

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

then comparatively in its youth. The traffic had not developed itself as it has since done, and so had nowhere outgrown the accommodation which had been deemed adequate to its requirements in the formation of the companies, and in fixing the amount of capital necessary to each undertaking. If any doubt could be entertained on this point it would be at once removed by referring to the history of this legislation; and where the meaning of an Act is doubtful, we are, I think, at liberty to recur to the circumstances under which it passed into law, as a means of solving the difficulty. The Act was a government measure. Its main purpose, as explained on its introduction by Mr. Cardwell, was to prevent the obstruction which had been opposed by some of the railway companies to a continuous through communication over different lines of railway, by throwing obstacles in the way of receiving and forwarding the traffic from other lines, at that time a subject of much complaint, and which had been the subject of investigation by a Committee of the House. A secondary purpose was that of preventing the inequality of the accommodation afforded, and the undue advantage frequently given to particular individuals or classes, to the injury and oppression of others. Of inconvenience to the public occasioned by the want of structural accommodation, as a ground of the measure, not the remotest trace is to be found in its progress through parliament, nor was anything of the sort aimed at by it.

It is said, indeed, that interference in the matter of structural erections or alterations must have been contemplated, as otherwise the power given to the Court to employ engineers to make inquiry and report would have been useless, as the assistance of engineers could not be needed for the solution of any question relating merely to traffic arrangements. In this, if it is limited to arrangements at a station, I agree; but the assistance of engineers might possibly be of great utility in the event of a question of reasonable accommodation in respect of the number of trains running on a line of railway, especially if complicated with the use of the line by another company, or in the event of a dispute between two companies as to arrangements for the uninterrupted conveyance of the through traffic. Indeed it was on this latter ground that this provision was explained and justified by the Lord Chancellor in

the House of Lords; and Mr. Cardwell, on introducing the bill, said that this provision had been imported into it by analogy to the 42nd section of the Chancery Procedure Bill of 1852, which contained a somewhat similar provision. That the assistance of engineers would be required for the purpose now suggested does not appear to have occurred to any one. Nor is this surprising. As matter of history, it may be safely asserted that the idea of compelling companies to erect or enlarge buildings did not enter into the measure as contemplated, nor was present to the mind of the legislature in passing the Act.

I must further observe that the constitution of the authority which is to exercise jurisdiction over railway companies under the Act of 1854 affords a strong argument against so extensive and formidable power as that now asserted. I cannot believe that it can have been intended that a Court of law, and still less a single judge, unable, and indeed without authority to enter upon any local inquiry, and able to institute such inquiry only through engineers or barristers, and acting only on the report of such engineers or barristers, should be able to exercise such a power. Still less can I bring myself to think that the legislature can have intended to place such a power of unfettered discretion, involving interests so large, in the hands of three gentlemen, without any appeal from its exercise, however serious the effect of their decision as affecting the interests of a company.

It should be observed that we are not called upon to say what, short of structural additions, would be included in "facilities" to traffic, within the meaning of the Act. I certainly am not prepared to give effect to the contention of the plaintiffs, and to limit the authority conferred by the Act to the insuring equality or the exclusion of undue preference. On the contrary, I should be disposed to hold that whatever can reasonably be expected from a company, with the means at its disposal, in the way of management, for the public convenience and advantage, in receiving, forwarding, and delivering the traffic—probably even to the extent of determining the number of trains to be run, or the times of departure or the like, would be within the authority. But this it is not necessary to decide. My judgment must be considered as limited to the question of structural additions. I cannot think

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Cockburn, C.J.

that a company can be forced against its will to find fresh capital for structural additions not within the scope of the original enterprise, and not contemplated in fixing, with parliamentary sanction, the capital of the company, simply because such constructions might be for the convenience of the public.

Numerous as have been the applications to the Court of Common Pleas under the Act, on complaints of undue preference a (fair proof that it was to this evil that its enactments were in great measure directed), there is but one authority applicable to the case before us, namely that of *In re Caterham Ry. Co.* (1), in which on an application for a rule nisi, three of the judges expressed an opinion that the want of sufficient station accommodation at a particular place at which trains stopped, might be a ground for the interference of the Court; but the fourth judge, Mr. Justice Cresswell, concurred in granting the rule on the ground of undue disadvantage alone. But the case is of but little authority; for the rule was never drawn up, and consequently no argument on it ever took place; and the judges in granting the rule nisi were evidently misled by the term "reasonable accommodation," which does not occur in the part of the section with which alone the judges in the *Caterham Case* (1) had, and we in the present have to deal, and which only requires that "reasonable facilities" shall be afforded "in receiving, forwarding, and delivering the traffic," the term "reasonable accommodation" which is the one on which the judges in the *Caterham Case* (1), dwell, being applicable only to that which is to result from the continuous traffic, provided for in the later and independent part of the section.

Feeling myself therefore unfettered by what was said in the *Caterham Case* (1), the only conclusion at which I can arrive, looking to the circumstances under which the Act of 1854 was passed, to the interference with vested rights which the construction of the Act contended for necessarily involves, and to the language of the 2nd section which, as it seems to me, falls far short of conferring so vast a power, is that the Act of 1854 does not confer on the Railway Commissioners, who in administering it, stand in the place of the Court of Common Pleas, the authority and jurisdiction which they are taking upon themselves to exercise,

(1) 1 C. B. (N.S.) 410.

and that consequently our judgment on this demurrer must be for the plaintiffs in prohibition.

LUSH, J. This is a demurrer to a prohibition issued at the instance of the South Eastern Railway Company to restrain the Railway Commissioners from proceeding to make certain orders which they have announced their intention to make under the Act of 1873 (36 & 37 Vict. c. 48), the Act by which the Commissioners are appointed to carry into effect the Railway and Traffic Act, 1854 (17 & 18 Vict. c. 31), as amended and enlarged by that Act.

It is not necessary at present to state in detail what the proposed orders are; it is sufficient to say that they require the company to extend and improve their station accommodation at Hastings and St. Leonards, and to make certain additional works adjudged to be necessary to accommodate the increased traffic at those stations, as regards passengers, animals, and goods.

The railway company object that it is not within the jurisdiction of the Commissioners to order any structural works or alterations whatever. The Commissioners have demurred to the declaration, and the question is thus directly raised, what is the extent of the jurisdiction conferred by the Act of 1854, as amended by the Act which establishes the Railway Commission.

Neither of the Acts gives any appeal to this or any other Court, except in the form of a special case upon some question of law, and this the Commissioners may state or not, as they think fit; and the Act of 1873 declares that "save as aforesaid, every decision and order of the Commissioners shall be final."

The jurisdiction we are called on to exercise is, therefore, the common law jurisdiction of restraining by prohibition every inferior tribunal from exceeding its powers. If the matter of the complaint to the Commissioners is one which it is competent to them to entertain, we cannot prevent their proceeding on it—so far as it asks what they have power to grant—and making such orders as the circumstances may in their judgment require. We have no jurisdiction in any case to review their decision upon a question of fact, nor upon a question of law which is not raised in the form of a special case.

†

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

LUSH, J.

The first part of the Act of 1854, which we are called on to construe, is by no means explicit. The particular phrase which creates the difficulty is large enough to admit of a wider or a narrower meaning, and a preliminary question arises, namely, what is the rule of construction to be applied to it? Is the Act a remedial or a penal Act? and if remedial, on whose behalf? To my mind the answer is obvious, that it is a remedial Act, and that it was passed in the interest of the public and not in the interest of the companies. The 7th section, it is true, gives a benefit to companies by limiting their liability for the loss of, or injury to, animals, to specified amounts, unless an insurance rate is paid for their carriage; but, on the other hand, this section also protects the sender of traffic, whether animals or goods, from being subjected to unreasonable conditions in carrying contracts; and all the rest of the Act contemplates only the convenience of the public.

If it is a remedial Act, it is to receive as liberal a construction "to advance the remedy" as its language taken as a whole will fairly admit of. For while we are to collect what the legislature intended from what it has said, we must look, not at one phrase or one section only, but at the whole of the Act, and must read it by the light which the state of the law at the time and the relation in which the travelling and sending public then stood to the carrying companies, throw upon it.

In 1854, the year of the passing of the Act, railway companies had not only all become carriers, but they had acquired a virtual monopoly of the carrying business of the country, for all kinds of traffic—passengers, animals, and goods. The only authority which had been invested with any controlling power was the Board of Trade, and their functions were limited to measures which concerned the public safety.

No line or portion of a line could be opened for traffic without a month's previous notice to the Board, and if the inspector of the Board reported that the opening would be attended with danger to the public using the railway, by reason either of the incompleteness of the permanent way, or the insufficiency of the establishment for working it, the Board were empowered to postpone the opening from time to time until it should appear to

them that the opening might take place without danger to the public.

Again, differences between the company and adjoining owners, who wished to have a communication between their siding and the railway, as regarded the point of junction, the decision of which was originally vested in justices, had been transferred to the Board of Trade: 3 & 4 Vict. c. 97, s. 19.

The Board had also authority to decide disputes between two or more companies whose railways had a common terminus, or a portion of the same line in common, or which formed separate portions of one continuous line of railway communication, and to prescribe what arrangements should be made and observed for conducting their joint traffic with safety to the public: 5 & 6 Vict. c. 55, s. 11.

Moreover, the Board had power to authorize the revival or extension of the compulsory powers for taking land if the public safety required additional land to be taken for certain specified purposes (s. 15); power to order the erection of screens between the railway and a public road to prevent horses being frightened by passing trains (8 & 9 Vict. c. 20, s. 63), and various other powers of a subordinate nature.

These powers still belong exclusively to the Board of Trade.

But neither the Board of Trade nor any other body had authority to direct anything to be done, or to interfere in any matter which concerned merely the convenience or accommodation of the public using the railway. Nor was there any legislative provision for securing equitable conditions in the carrying contracts of railway companies; and although they were enjoined by statute to charge equal tolls to all persons and after the same rate per ton per mile, or otherwise in the same circumstances; and although as carriers, they were bound to treat all their customers alike in like circumstances, no means were provided for summarily enforcing this duty, but the parties aggrieved were left to pursue their remedy by the ordinary course of law.

The Act in question was passed to supply these defects. It is applicable to both railways and canal companies, and is entitled "An Act for the better Regulation of the Traffic on Railways and Canals," and the preamble states that it is expedient to make

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Lush, J.

better provision for regulating "such traffic." The former Acts which gave jurisdiction to the Board of Trade were "for the better regulation of railways." I agree with the counsel for the company that the words both of the title and preamble primâ facie refer to traffic management (properly so called), and that unless we find in the enactment language which requires a wider interpretation they must be so construed.

The Act commences with an interpretation clause which explains and amplifies the words of the enactment. "Traffic" is to include not only passengers and their luggage, and goods, animals, and other things conveyed upon the railway or canal, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal.

"Railway" is to include every station used for purposes of public traffic, and "canal" every wharf and landing place, and "railway company, canal company," &c., is to include "every person being the owner or lessee of, or any contractor working any railway or canal, constructed or carried on under the powers of any Act of Parliament."

These definitions are repeated in the Commissioners' Act of 1873.

The 2nd section of the Act—the one upon which the question arises—enacts that

"Every railway company, and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and

"No such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever; nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and

"Every railway company, and canal company having or working

railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near to the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other without any such preference or advantage or prejudice or disadvantage as aforesaid; and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf."

These are the precise words of the section. I have, for the sake of clearness, divided it into the three paragraphs, of which it is composed, because each of them in my opinion treats of a separate subject.

The counsel for the company objected to this division of the section, contending that it legislates for two subjects only, namely, undue preference and undue obstruction of through traffic.

To establish this argument he proposed to strike out the word "and" which connects the first paragraph with the second, and to substitute the words "so as" thus blending the two paragraphs into one.

If the first paragraph had been so worded as to be unintelligible, unless it were linked to the second, or as to produce consequences so absurd that it could not be supposed the legislature intended them, it might have been allowable so to change the words. But it is perfectly intelligible and complete as it stands, and its construction, whether the wider or the narrower sense be put on the word "facilities," involves no absurdity. We are not therefore at liberty to alter its language. This would be not to expound but to legislate.

This reading of the section is borne out by the way in which it is recited in the 11th section of the Commissioners' Act, 1873.

That section run thus: "Whereas by s. 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company, and canal company, and railway and canal company, shall,

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Lush, J.

according to their respective powers, afford all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference," &c. Here the paragraphs are even more distinctly marked, and quoted as independent paragraphs.

The main argument, however, was, that the Act contemplates only traffic arrangements properly so called, and that what is meant by "affording all reasonable facilities," is as respects passengers and their luggage, providing sufficient porters, sufficient carriages, luggage vans, and such like conveniences, and making the best arrangements in their power for the train service; and as respects their stations, making the best use of them, and of their appendages, in the condition in which they are, for the accommodation of the traffic; but that under no circumstances are the Commissioners empowered to order any structural alterations of any kind; and they call in aid the title and preamble of the Act, and the repetition of the phrase "all reasonable facilities" which occurs in the third paragraph, and which in that connection cannot have reference to structural alterations.

On the other hand, the Commissioners do not propose to order the company to apply to parliament for further powers, or in any way to acquire ability to give additional accommodation, or to do anything which is not within their present ability to do, but what they claim is, authority to compel the company to make use of the property and means which they possess, including the adaptation of their station premises, platform, and other traffic works to the exigencies of the traffic, so as to afford to the public all the accommodation which the public reasonably require, and which the company have the power to give, whether by building or otherwise.

They do not claim to dictate any particular style of architecture or quality of materials, but only to say in what respect and to what extent the premises require enlargement, alteration, or addition, to suit the traffic.

This is the question at issue, and I am of opinion that there are provisions of the Act which require the larger meaning to be put on the word "facilities" in this section, and consequently that the view which the Commissioners take of the meaning of the Act is the right one.

The words "according to their respective powers" which occur in the first paragraph, and nowhere else in the Act, appear to me of great significance. Every railway Act necessarily confers large and varied powers on the company—powers to take by compulsion any lands—within the limits of deviation, to divert road and streams, to hedge over or under them, to construct such warehouses, offices, stations, and other buildings, as they think proper, and do all other acts necessary for making and working the railway. But these general powers are not unfrequently fettered by special clauses, the result of local opposition, so that all companies have not in all respects equally wide powers. For example, one company may be prohibited from erecting a station beyond certain limits in one direction, or from extending their buildings beyond a given point, or raising them beyond a given height in a certain locality; another may be prohibited from erecting anything to obstruct a right of way at a given spot, or may be compelled to erect and maintain a bridge for the use of a private occupier which may in time present an obstacle to some extension of their buildings which it might be convenient to make. Various matters of this kind prohibited or made obligatory by their Act may incapacitate a company from affording at all their stations all the facilities which the traffic might in after years require. What may be within the legal capacity of one company may be beyond the legal capacity of another. Besides, the line may be worked by a lessee or a contractor who may not have the right to make any alteration in the works. The Act is intended to control those who actually work the lines, and are the carriers for the public. If the word "facilities" in the first paragraph covered nothing more that traffic arrangements, these qualifying words, "according to their respective powers," would be not only out of place, but would be absurd, for no carrier, whether company or individual, is under any legal restriction as to the amount of accommodation which he affords to his customers in the way of

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Lush, J.

traffic arrangement. Therefore, the third paragraph of this section, which enjoins the company to afford "all due and reasonable facilities" for receiving and forwarding through traffic without unreasonable delay and without undue preference, contains no such words. The requirement here is absolute.

The 18th section of the Commissioners' Act also requires every company to "afford all reasonable facilities for the receipt and delivery of mails at any of their stations without requiring them to be booked or interposing any delay." The qualifying words are here also omitted and for the same reason.

Thus the insertion of such a phrase in the first paragraph implies that the "facilities" intended by the legislature comprehended something which all companies, or persons who work the line might not have legal capacity to afford. They thus furnish a key to the construction which makes it clear to my mind that the legislature means the word "facilities" in this part of the Act to be taken in its widest sense, and to include facilities of every kind which is within the legal capacity of the company to give.

If we adapt the first paragraph to the case before us, by importing into it the appropriate words supplied by the interpretation clause (as we must do in order to read it aright), the paragraph as applied to passengers, would stand thus: "Every railway company shall, according to its powers, afford all reasonable facilities for receiving passengers and their luggage at the station, for forwarding them on the railway, and for delivering them." Here is a duty imposed for the benefit of passengers, the measure of which is the reasonable requirements of the passenger on the one hand, and the legal capacity of the company on the other. Within these limits the company are to afford all facilities for the several stages of the journey.

"Facilities" for receiving at the station includes convenient access to the station and convenient accommodation there while waiting for the train.

"Facilities" for forwarding, includes conveniences for taking tickets and for getting from the station to and into the carriages.

Suppose the ordinary traffic at a given place to have so far outgrown the capacity of the station that it no longer contains

standing room for more than one half of the passengers, and that the regular trains overlap the platform at both ends, so that half of the passengers have to remain outside the station or on the permanent way till the train arrives, and then mount the carriages from the level of the line. And suppose there is ample space belonging to the company for extending the station and plaftorm to the length of the ordinary trains, and they are free to use it for that purpose, can it be said that they afford all reasonable facilities in their power for receiving and forwarding their passengers, while they refuse to give the additional accommodation?

Or, suppose the way to the station through the company's land has become dangerous for want of repairs, or by reason of obstructions placed there; or, suppose the entire platform to be without a roof, and no other place is provided for passengers to wait, than the one exposed to the weather, where they may get wet through before getting into the carriages, would this be affording "all reasonable facilities" for receiving passengers at the station?

If not, it would I think be within the jurisdiction of the Commissioners to order the company in the one case to enlarge their station and platform, and in the other to repair and clean the way to and from the station, and to cover the platform.

The only authority upon this subject that was quoted, and that I am aware of, is the *Caterham Case* (1), referred to by the Commissioners in their judgment, and which came before the Court of Common Pleas in 1857. It was a complaint by the Caterham Railway Company against the Brighton and the South Eastern Companies of undue prejudice to the passengers of the Caterham line, in several particulars, one of which was, that no covered place was provided for them at the Caterham junction while waiting for the train. The Court dismissed the complaint as to all except the latter ground, and upon that they granted a rule to shew cause why the companies should not provide a covered station at that point as they had done at other stations on their line. Each of the judges expressed an opinion that the case was within the section. The companies, however, did not shew cause, but submitted to the claim, and therefore the

(1) 1 C. B. (N.S.) 410.

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Lush, J.

opinions expressed have only the weight of first impressions. But neither of the judges intimated any doubt upon the point. (1)

I must here refer to the 17th section of the Commissioners' Act, as it appears to me to afford an additional argument in favour of the wider construction of the word "facilities" in the first paragraph, and also to give additional weight to the opinions expressed by the Court in the *Caterham Case.* (2)

I must premise that the Court of Common Pleas in *Bennett* v. *The Manchester, Sheffield, and Lincolnshire Ry. Co.* (3), had taken a more limited view of their powers under the Act of 1854. The company had become proprietors of the Grimsby old dock and of a new dock communicating with their railway, and they were required by Act of Parliament to maintain the old dock and the approach thereto of a given depth. The dock and its approach had become silted up, and the depth of water insufficient for vessels to get to the wharves adjoining, and it was imputed to the company that their object was to divert the traffic from the old dock to the new one. An application was made under the Act of 1854, for a mandatory injunction to the company to clean the dock and the approaches, and the Court held, that as the complaint alleged a breach of a public duty which was already susceptible of redress by mandamus or indictment, the case was not within the Act of 1854. A similar doctrine would, of course, have been applicable to a canal company which had suffered the canal to become unnavigable for want of dredging or sufficient water supply.

The 17th section of the Act of 1873, enacts that "every railway company owning or having the management of any canal or part of a canal, shall at all times keep and maintain such canal, or part, and all the reservoirs, works, and conveniences thereto belonging, thoroughly repaired and dredged, and in good working condition, and shall preserve the supplies of water to the same so that the whole of such canal or part may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption, or delay." The 6th section gives the Commissioners power to

(1) 1 C. B. (N.S.) 410; 26 L. J. (C.P.) 161.

(2) 1 C. B. (N.S.) 410.

(3) 6 C. B. (N.S.) 707.

receive complaints of anything done or of any omission made in violation of the Act of 1854, or *of that Act*, and thereupon to exercise all the jurisdiction conferred by the 3rd section of the Act of 1854.

In this respect the Act of 1873 corrects the judgment of the Court of Common Pleas in the case just cited and enables them not only to order traffic arrangements but to order the company working a canal to keep the canal in efficient working order for the traffic. In other respects also it explains and amends by enlarging the powers given by the Act of 1854 (see s. 11), but contains nothing which bears upon the view taken by the Court in the *Caterham Case*. (1) That case had been reported for nearly sixteen years; it must have been known to the company moving this prohibition, for the rule was against them, and was no doubt known to all the railway authorities, and if the legislature had disapproved of it it is reasonable to suppose they would have corrected that as they corrected the decision in the canal case. The 3rd section of the Act of 1854 contains a provision which also has an important bearing upon the question before us. It authorizes the Court of Common Pleas, "in order to form a just judgment on the matter of the complaint, to direct and prosecute in such mode and by such engineers, barristers, or other persons, as they might think proper, all inquiries as might be deemed necessary," and to authorize them to receive evidence on oath.

The 6th section of the Commissioners' Act of 1873 expressly transfers to them all the powers vested in the Court of Common Pleas.

The counsel for the company was asked in the course of the argument what employment could be found for engineers if his construction of this Act was the right one. His reply was, that they might have to decide whether an adjoining owner should or should not have a junction between his siding and the railway. This however many of the railway Acts before 1845 and the Railways Clauses Act of that year gave as a right if it could be done with safety (s. 76), and any dispute about the point of junction, or whether a junction could safely be made, had, as I before observed, been left to the Board of Trade. He further

(1) 1 C. B. (N.S.) 410.

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Lush, J.

suggested that the Commissioners might be called on to decide how the traffic should be conducted between two companies whose lines had a common terminus or point of junction. The same answer applies to this. It is true that the Board of Trade had and still have to regard only the public safety, but with that view they fix the point of junction and direct how the traffic shall be worked. I cannot conceive of any engineering question being evolved out of an inquiry into mere traffic arrangements, but I can conceive of such question arising where the dispute is whether a station should be extended in a given direction or additional works made. I do not feel pressed with the argument that the company might have expended their capital, and might by such orders be called upon to exhaust the fund which should go to the shareholders. The income is the fund which the Companies Clauses Act 1845, s. 122, points out as the fund for enlarging as well as for repairing their works.

I am therefore of opinion, first, that the Commissioners had jurisdiction to entertain the complaint, and secondly, that they have jurisdiction to make all the orders which they have intimated their intention to make, except the order to provide a refreshment room, by which I understand a room in which the company are to provide refreshments. That, I think, is ultrà vires.

As regards the prayer for a more direct route to the St. Leonards station, I do not understand that the Commissioners propose to make an order, or to do more than recommend the company to endeavour to make arrangements with the road authorities for opening their roads.

MANISTY, J. This is a demurrer to a declaration in prohibition by which the plaintiffs, the South Eastern Railway Company, pray for a writ of prohibition directed to the Railway Commissioners to prohibit them from further proceeding in any way touching an application made to them by the defendants, the Mayor, Aldermen, and Burgesses of Hastings, pursuant to the "Railway and Canal Traffic Act, 1854," and the "Regulation of Railways Act, 1873."

That application was in substance for an order requiring the railway company—

1. To enlarge the Hastings station, and to provide better

booking office, waiting room, refreshment room, and general accommodation therein.

2. To lengthen and deepen the existing platforms of the said station, and to provide additional platforms.

3. To provide better warehouse accommodation for goods at the said station.

4. To provide better pens at the same station, and additional sidings for cattle trucks.

5. To enlarge the platform of the St. Leonards station, and to provide that station with a new approach by a direct route.

The full text of the application is set out in the declaration.

The Railway Commissioners have delivered a judgment, which is also set out at length in the declaration. It consists in part of orders, and in part of recommendations.

Among the proposed orders one is to the effect that, considering the exposed position of the station and that Hastings is a place of resort for invalids, the Commissioners think there is not shelter as things are, and therefore they shall order a substantial addition to be made to the area of the covered platform, and the yard also to be so arranged as that carriages may set down and take up under cover.

Another proposed order is to the effect that the company is to provide at Hastings two general and two first class waiting rooms, each at least twice as large as the largest of the present rooms, and to reserve also part of their buildings for refreshment purposes.

It is unnecessary to advert at greater length to the terms of the order proposed to be made by the Commissioners, because it was agreed on the hearing of the demurrer that the Court should only express its opinion as to the power of the Commissioners to compel the company to construct structural works such as those proposed.

The obligations of the company, and the powers of the Commissioners, which of course cannot exceed the obligations of the company, depend, so far as this case is concerned, upon the true construction of the 2nd section of the Act of 1854.

That section is in my opinion divisible into two parts, and two only. The first relating to the traffic proper of any given railway;

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Manisty, J.

the second relating to what I will venture to call foreign traffic, that is to say, traffic carried by and received from one railway to be forwarded by or on another.

By the first part of the section it is enacted that every railway company, canal company, and railway and canal company, shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By the second part of the section it is enacted that every railway company, canal company, and railway and canal company, having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

In each part of the section the railway company is required to afford all reasonable facilities for the purposes mentioned in it, and that without undue or unreasonable preference, or advantage, or prejudice, or disadvantage, but the first part of the section alone contains the words "according to its powers."

Now it seems to me that these are qualifying words of great

significance, and in order to construe them it ought to be borne in mind that the statute deals with an existing railway, which, by the interpretation clause, includes every station of or belonging to such railway, used for the purposes of public traffic, and that the expression "railway company," includes any person being the owner, or lessee of, or any contractor working any railway constructed or carried on under the powers of any Act of Parliament.

It should also be borne in mind that before an Act of Parliament can be obtained for making a railway, plans must be deposited shewing the works proposed to be constructed, and very strict proof is required in support of the estimated cost of construction, which forms the basis of the authorized capital of the company.

We start therefore with this, that a railway company constituted by Act of Parliament, has only limited powers and a limited capital, which capital is fixed with reference to the cost of the land authorized to be purchased, and the works authorized to be constructed.

It should also be borne in mind that before any railway can be opened for public use, it has to be passed by a Government Inspector, whose duty is to see that the line and all the stations are completed and properly constructed in accordance with the deposited plans.

Such being some of the circumstances to be borne in mind in construing the Act of 1854, which, be it observed, is an Act for the better regulation of the traffic on railways and canals, let us consider what is the meaning of the enactment that every railway company shall "according to its powers," afford all reasonable facilities for receiving and forwarding the traffic, as defined by the interpretation clause in each of the two Acts.

Does it mean, as contended for by the plaintiffs, that the company shall so use and manage its railway with its stations and works, and so conduct its business as to afford, according to its powers, all reasonable facilities for receiving and forwarding the traffic?

Or does it mean, as contended for by the defendants, that if traffic increases beyond what was originally contemplated and provided for, every railway company is compellable from time to time according to its powers (meaning thereby, as is contended,

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Manisty, J.

according to its legal capacity) to acquire more land, and construct new and enlarge old works, so as to afford reasonable facilities for receiving and forwarding the increased and increasing traffic.

I am of opinion that the plaintiffs' construction of the Act is the correct one, and that to adopt the defendants' construction would be to impose upon railway and canal companies a burden such as the legislature never contemplated, and such as I should think few companies would undertake.

It is said that unless the defendants' construction of the Act be adopted, the public are at the mercy of railway and canal companies; in short, that the Act of 1854 is a dead letter.

As regards the public being at the mercy of railway companies, it seems to me that the danger is more apparent than real, even if there be any reality in it, which I doubt. It is the interest of every company to make provision from time to time for increased traffic so soon as the outlay would be remunerative, and that they do so is abundantly proved by the numerous Acts of Parliament which are from time to time obtained for the purpose.

It was well said by Jervis, C.J., in delivering the judgment of the Exchequer Chamber in the case of *York and North Midland Ry. Co.* v. *The Queen* (1) with reference to compelling railway companies to exercise their powers, that if the work would be remunerative it would probably be proceeded with, and that it is not for the public interest that work should be undertaken if, when made it would not be remunerative; adding that "by leaving the exercise of the powers to the option of the company the legislature adopts the safest check upon abuse—self-interest," and as to the statute being a dead letter, I think this is a misconception—because I suppose it will not be disputed that the Commissioners have the power to compel railway companies and their lessees and working contractors to maintain their railway, including stations, in an efficient state of repair, and to conduct their business so as to afford, according to their powers or means, the facilities mentioned in the statute without giving any undue or unreasonable preference or advantage to any person or company.

These are large powers, and I venture to think that if the legislature had intended to give to the Court of Common Pleas or

(1) 1 E. & B. 858, at p. 865. 17 L.J. 690, 693.

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Manisty, J.

to a single judge (for it must be borne in mind that a single judge was authorized to exercise all the powers given to the Court) the unlimited powers now claimed by the Commissioners as their successors, very different language would have been used to that which is to be found in the 2nd and 3rd sections of the Act of 1854.

It is by no means an uncommon case for a railway company to be made by one company and leased to another. In such a case it seems to me the first part of the 2nd section of the Act of 1854 could only admit of the construction contended for by the plaintiffs. A lessee surely could not be called upon to expend his earnings in enlarging the stations, &c., and yet that would be the only source out of which he could do it.

Again, the insertion of the words, "according to their respective powers," in the first part of the 2nd section and the omission of them in the second part is very significant. I am inclined to think the legislature meant in the second part of the section, to make it compulsory on all owners and lessees and working contractors of railways, which form part of a continuous line of railway, to afford reasonable facilities for receiving and forwarding what I will venture to call the foreign traffic, even though they might have to apply their earnings in order to accomplish that purpose. But surely it never could have been intended that every railway and canal company in the kingdom should be compellable either by increasing its capital, if it had the power to do so, or by expending its earnings, to enlarge and extend its railway so as to meet the requirements for the time being of the public.

What the Commissioners are really claiming to do in the present case is, not to compel the South Eastern Railway Company to give facilities according to its powers, but to compel them to increase their powers for giving facilities. That this is so appears from their judgment and the orders they propose to make. They say at page 2 of their judgment, "Two things that are urgently required are additional ground for the purpose of giving a more extended area to the station and the widening of the bridge by which the trains from the south coast and the trains from Tunbridge Wells enter the station." They then go on to state that the company sold their surplus lands in 1856, and that

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Manisty, J.

they subsequently obtained an Act of Parliament to enable them to enlarge their station, but their compulsory powers expired by lapse of time without being used; and that they have twice since, viz. in 1870 and again in 1875, applied to parliament for compulsory powers, but owing to the bills being opposed they withdrew them. The Commissioners then proceed thus: "We do not feel called upon to say whether the company had or had not sufficient reason for not going on with their applications to parliament in 1870 and 1875, but we can have no doubt that with the traffic of the two companies in and out of Hastings, so large as it is and every year becoming larger, it is necessary that the South Eastern Company should find means to extend the limits of their station."

And after adverting to an arrangement which the railway company have made for widening the bridge, the Commissioners proceed to make orders for enlarging the stations and constructing new works, all of which are set out in their judgment, and to some of which I have already specially adverted.

If the Commissioners have the power to make such orders as these I do not see why they should not order a railway with a single line of rails to be converted into one with two lines of rails with suitable stations and other conveniences, if they thought the traffic required it, and the company had the legal capacity to do it. Surely this would be at variance with the principle upon which the legislature has hitherto acted in sanctioning the construction of railways.

As a rule, Acts for the construction of railways are permissive, not obligatory: see *The York and North Midland Ry. Co.* v. *The Queen.* (1) No doubt there are exceptions, but they are of rare occurrence.

The 122nd section of the Companies Clauses Consolidation Act, 1845, is in accordance with the general principle. It empowers the directors if they think fit to set aside out of the profits such sum as they may think proper to meet contingencies or for enlarging, repairing, or improving the works connected with the undertaking and divide the balance only among the shareholders.

(1) 1 E. & B. 838.

The borrowing powers are also permissive, see s. 38.

It is said that as regards matters within their jurisdiction the Commissioners are the sole judges of what is reasonable. That is conceded. But it is also said that they have power in point of law to compel any railway or canal company having statutory powers to execute any works which they deem reasonably necessary for accommodating the existing traffic, provided the company has the legal capacity to do what they order.

It seems to me that this is in effect saying that the Commissioners can compel railway and canal companies to exercise all their permissive powers not only as regards capital (be it share or borrowed) but also as regards their earnings.

It would require very strong and unambiguous language to convince me that the legislature ever meant to vest such a power in a single judge of the Court of Common Pleas or in any Court or tribunal whatever; and I find no such language either in the Act of 1854 or that of 1873.

The Commissioners in their judgment rely upon the *Caterham Case* (1) as an authority for the view they take of their powers. They say the judge of the Common Pleas in that case acted upon the principle that the legislature did intend by the word "facilities" to give the public a remedy for a want of reasonable accommodation in the way of works.

The only ground upon which the judges even granted a rule nisi in that case was the allegation of the complainants that whereas there were covered stations at all other places on the line there was not the same accommodation at the Caterham Junction, and so the company subjected passengers travelling on the Caterham line to undue inconvenience and disadvantage. The case, therefore, is no authority whatever for the proposition that the Act gives the Commissioners power to order the construction of new and the enlargement of old works to meet increased traffic wholly irrespective of the question of undue preference or undue disadvantage. Moreover the granting of a rule nisi which never came on for argument can scarcely be cited as an authority for any proposition.

There is really no authority bearing upon the question now

(1) 1 C.B. (N.S.) 410.

1880

SOUTH EASTERN RAILWAY CO. v. THE RAILWAY COMMISSIONERS.

Manisty, J.

before the Court, and that is a fact of some significance, seeing that the Act has been in operation for a quarter of a century.

Before I conclude I must notice an argument which has been a good deal pressed on the part of the defendants. It is said that in the 3rd section of the Act of 1854 power is given to the Court of Common Pleas or a judge to direct inquiries to be made by engineers, barristers, or other persons to enable such Court or judge to form a just judgment on the matter of any complaint of a violation of the Act, and it is contended that this affords ground for inferring that the 2nd section was intended to give the power claimed by the Commissioners, because it is said no engineering question could arise out of an inquiry limited to facilities for receiving and forwarding traffic.

To this I would make a twofold answer—first, I do not think such a power as that which is sought to be exercised should be in any degree a matter of inference. It ought to be found if at all in plain unambiguous language.

Secondly, I think engineering questions of considerable nicety might well arise out of an inquiry limited to facilities for receiving and forwarding foreign traffic. The assistance of an engineer might also well be required if a complaint were made that a particular part of a line was not maintained in good working order, or that access to a station was obstructed, &c., &c. But probably the clause was inserted pro majori cautela without reference to any particular purpose.

For all these reasons I am of opinion that the Commissioners have not the jurisdiction which they claim. Whether they have the power to order some of the comparatively small things which are involved in the application of the corporation of Hastings may admit of doubt, but it was arranged that the Court should only express its opinion upon the general question.

Rule absolute.

Solicitor for the South Eastern Railway: *W. R. Stevens.*

Solicitor for the Corporation of Hastings: *J. H. Lydall, for G. Meadows, Town Clerk, Hastings.*

Solicitor for the Railway Commissioners: *Solicitor to the Treasury, Hare & Fell, agents.*

[CROWN CASE RESERVED.]

1880
Feb. 28.

THE QUEEN *v.* BISHOP.

Lunatic—Lunatics, Reception of, in Unlicensed House—Honest Belief—Mens rea—8 & 9 Vict. c. 100, *s.* 44.

The defendant was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the above Act, or under any previous Act, but it was specially found by the jury who convicted, that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic:—

Held, by the Court (Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Stephen, JJ.), that such belief was immaterial, and that the conviction was right.

THE defendant was tried before Stephen, J., at Northampton, upon an indictment charging her with an offence against the 44th section of 8 & 9 Vict. c. 100, by receiving into her house two or more lunatics, such house not being an asylum or hospital registered under the Act, or a house duly licensed under the Act.

It was proved on the trial that the defendant received into her house several young women for the purpose of medical treatment. Her stepdaughter, who was called as a witness on her behalf, and who took part in the management of the house, described them as patients suffering from "hysteria, nervousness, and perverseness," and it was proved that she advertised in newspapers for patients so described. She had besides these patients one inmate who was admitted to be a lunatic, with regard to whom she had complied with the requisitions of s. 90 of the same Act.

There was conflicting evidence upon the question whether any of the other patients were lunatics or not, and as to the nature and degree of restraint to which they were subjected, and there was strong evidence to shew that the defendant believed in good faith, and on reasonable grounds, that no one of them was a lunatic, but that they were all suffering only under hysteria, nervousness, or perverseness.

The learned judge read to the jury the interpretation of "lunatic" given in s. 114: "Lunatic shall mean every insane

1880

THE QUEEN v. BISHOP.

person and every person being an idiot or lunatic or of unsound mind," and he told them that, in his opinion, these words would include every one whose mind was so affected by disease that it was necessary for his own good to put him under restraint.

The learned judge also told them that in his opinion the words "receive one or more lunatics," meant "receive as lunatics, and in order to be treated as lunatics are treated in asylums," and he gave them this direction: "In order that the defendant may be convicted the jury must be of opinion that at least one other patient in the house beside the admitted lunatic was either an insane person, or an idiot, or a lunatic, or of unsound mind when received; and that such person was received into the house to be treated as a lunatic is treated in an asylum."

The learned judge also told them that he was of opinion that if one other such person besides the admitted lunatic was so received, an honest belief on the part of the defendant that that person was not a lunatic would be immaterial; but at the request of the counsel for the defendant, he asked them, if they convicted the defendant, to find specially whether she believed honestly and on reasonable grounds that any person so received was not a lunatic.

The jury found the defendant guilty, but they found that she did honestly, and on reasonable grounds, believe that no one of her patients was lunatic (except, of course, the admitted lunatic).

The learned judge directed the defendant to enter into her own recognizances to come up for judgment if called upon, in order that she might have an opportunity of complying with the provisions of the Act, but he reserved for the determination of this Court, the question whether his direction to the jury was right, in order that if it was wrong, the conviction might be set aside.

No counsel appeared for the defendant.

Mellor, Q.C. (*Harris,* with him), for the prosecution. Sect. 44 of 8 & 9 Vict. c. 100, under which the conviction was, is as follows: ". . . . it shall not be lawful for any person to receive two or more lunatics into any house, unless such house shall be an asylum or an hospital registered under this Act, or a house for the time being duly licensed under this Act, or one of the Acts hereinbefore repealed, and any person who shall receive two or

more lunatics into any house other than a house for the time being duly licensed as aforesaid, or an asylum or an hospital duly registered under this Act, shall be guilty of a misdemeanour." The object of the Act is to prevent lunatics being received into houses unlicensed and places unregistered, and there is nothing in the wording of the section with regard to the knowledge of the person receiving lunatics as to their lunacy. Nothing as to *knowingly* receiving lunatics occurs in the section. Persons received to be treated as lunatics are under some degree of restraint, and the section is to secure that a system of restraint shall not be applied without the knowledge of the Commissioners in Lunacy. The finding of the jury was express that these persons were lunatic, and was arrived at after the learned judge had called their attention to the sections of the statute.

[FIELD, J. Can all hysterical patients be termed lunatic?]

No, it is not so contended; the jury were told the restraint meant by the statute was restraint of a permanent character.

[STEPHEN, J. I did not intend to reserve the question of whether the evidence proved that the patients received by the defendant were lunatic.]

LORD COLERIDGE, C.J. I think the conviction was right. If the knowledge of the parties so receiving lunatics is the only question, it is quite plain.

DENMAN, J. I also agree that the conviction in this case ought to be sustained. The question reserved was whether the fact that the defendant thought the person not lunatic was a defence. If we were to so hold, the object of the statute might be frustrated.

POLLOCK, B. I agree that the conviction ought to be sustained, and I wish it to be thoroughly understood that we affirm the direction of my Brother Stephen, when he told the jury that the word "lunatic would include every one whose mind was so affected by disease that it was necessary for his own good to put him under restraint," in the sense that by "restraint" is meant restraint *ejusdem generis* with that applied to lunatics in asylums. The further direction that they must find "one other patient in

1880

THE QUEEN v. BISHOP.

the house besides the admitted lunatic was either an insane person, or a lunatic, or of unsound mind when received into the house to be treated as a lunatic is treated in an asylum," protects hysterical patients, or patients suffering from any disturbance of mind for which it would be advisable for her or his own good that he or she should be restrained in one sense temporarily. With regard to the point whether the knowledge, or absence of knowledge, of the keeper is material, I am clearly of opinion it is not.

FIELD, J. I am also of opinion that this conviction should be affirmed. If it were necessary to decide who are or who are not lunatics, I should wish to consider, but it is not. The object of the Act was to place all such persons under a competent authority.

STEPHEN, J. I am of the same opinion. I may say upon the mere question whether knowledge on the part of the defendant is essential to the offence under this Act, I entertained no doubt at all at the trial, and I certainly do not now, and that for the reasons which have been stated. I reserved the point because I understood that the Commissioners of Lunacy considered the case as one of great importance, and that they wished to obtain as solemn a judicial decision on the meaning of the Act as could be had. With regard to what has been referred to as my definition of lunatic, I may say I do not think, upon reflection, that the case which I submitted contained quite as much as it ought to have done of what I said to the jury on the subject.

I read to them the interpretation of lunatic given in the section 114, and I then told them that in my opinion (this is not stated in the case, but it took place) those words were sufficiently wide to include every person who was by reason of mental disease, or disease affecting the mind, in such a condition that it was necessary, or advisable at any rate, for his, or her, own good to subject him, or her, to the restraint of a lunatic asylum.

I added (this was the point not stated in the case) that that was said not by way of a legal definition, which bound them, it was not a positive direction to them, but that upon the whole it was the best construction which I could place upon the words of

1880

THE QUEEN v. BISHOP.

the Act, which are very general indeed; because it says that "lunatic" shall mean every insane person, and every person being an idiot, or lunatic, or of unsound mind.

In other words, "lunatic" shall mean not only lunatic, but insane, and idiot, and a person of unsound mind, and I said that I thought that if there was any difference between a lunatic, and an insane person, and a person of unsound mind, that those persons of unsound mind, not being lunatics must be such, that it was necessary for their own good to subject them to that kind of restraint which is exercised in lunatic asylums over persons afflicted with lunacy.

Conviction affirmed.

Solicitors for the prosecution: *Vandercom, Law, & Hardy.*

[IN THE COURT OF APPEAL.]

1879
Dec. 5.

HAMILTON & CO. *v.* JOHNSON & CO.

Practice—Motion to set aside Special Finding of Jury—Entry of Judgment by High Court—Rules of the Supreme Court, Order XL., rules 4, 10.

When judgment has been given in an action tried before a jury who have found specially the facts in dispute, upon a motion in the High Court to set aside the findings the Court has power to set aside the judgment and enter it for the unsuccessful party at the trial, if they are of opinion that the findings and the judgment at the trial cannot stand, and if they have before them all the materials necessary for finally determining the questions in dispute.

THE plaintiffs were shipbuilders at Port Glasgow. The defendants were shipowners at Liverpool. It was agreed that the plaintiffs should build for the defendants a vessel of certain dimensions to be paid for by instalments, and that the defendants should have the option of ordering a second vessel of the same dimensions. A model and also plans were to be submitted and approved of. The first vessel was built by the plaintiffs and accepted by the defendants. In pursuance of the option reserved to them, the defendants ordered a second vessel, which the plaintiffs agreed to construct, but they requested permission to increase the length by four feet. To this the defendants

1879

HAMILTON v. JOHNSON.

assented. At the time of giving the order the defendants intimated that they should require a model of the second vessel, which the plaintiffs agreed to furnish. Nothing further was said at the time of giving the order about a model or plans. Some four months later a dispute arose between the plaintiffs and the defendants as to the payment of the instalments, and the defendants then made a requisition for the plans and model, and refused to recognise any liability as attaching to them until the plans and model had been approved of. After some controversy the plaintiffs offered to furnish a model and a copy of the first ship with the additional length, but not on the ground that they were required for approval, the construction of the second vessel being too far advanced to admit of any alterations from the plans of the former vessel. The defendants then gave notice that they declined to recognise the contract as any longer binding on them, and they withdrew from the transaction. The plaintiffs did not acquiesce in this at first, and a great deal of correspondence ensued, but at last the plaintiffs announced their intention of selling the vessel, at which the defendants protested. The vessel was put up for sale, but no bidder could be found, and the price of vessels having become less, the loss to the plaintiffs was estimated at 2086*l.*

At the trial before Denman, J., the jury found, in answer to the questions of the judge, that the contract meant that the plaintiffs should supply only one model and one set of plans for the two ships; that if the legal construction was to the contrary, the defendants had waived their right to the second set; and the jury assessed the damages at 2086*l.* Denman, J., entered judgment for the plaintiffs for that amount.

The defendants obtained an order nisi in the Queen's Bench Division to set aside the verdict on the ground of misdirection, and also on the ground that the findings were against the weight of evidence, and that the damages were excessive. Cockburn, C.J., and Lush, J., were of opinion that when the defendants repudiated the contract, the plaintiffs held them to it and insisted upon its being performed, and that the subsequent attempt by the plaintiffs to sell the vessel was wrongful. Their lordships were of opinion that the action was misconceived, and that all the necessary

materials for finally determining the dispute being before the Court judgment ought to be given for the defendants, notwithstanding the findings of the jury.

The plaintiffs appealed.

C. Russell, Q.C., and *Warr*, for the plaintiffs, by way of preliminary objection, contended that the Rules of the Supreme Court, Order XL., rule 10 (1), applied only to trials before a jury where there had been a general finding, that the Queen's Bench Division had no power to enter the judgment for the defendants upon the special findings of the jury, and that if the defendants wished to set aside the judgment they ought to have appealed to the Court of Appeal under Order XL., rule 4. A great change of practice had been introduced by the Rules of the Supreme Court, December, 1876, and Order XL., rule 10, which was one of the original enactments, ought now to receive a limited construction.

Herschell, Q.C. (*C. Crompton*, with him), for the defendants, argued that if the defendants had appealed in the first instance to this Court, they must have admitted that the findings and the direction to the jury were right, and that when the Queen's Bench Division had come to the conclusion that the findings and judgment could not stand, the whole matter was at large, and the Court had power to enter judgment for the defendants.

(1) By the Rules of the Supreme Court, December, 1876, Order XL., rule 4 (substituted for Rules of the Supreme Court, 1875, Order XL., rule 4): "Where, at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. An application under this rule shall be to the Court of Appeal."

By the Rules of the Supreme Court, 1875, Order XL., rule 10: "Upon a motion for judgment or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, as it may think fit."

1879

HAMILTON v. JOHNSON.

BRAMWELL, L.J. In my opinion, this preliminary objection ought not to be allowed to prevail. Order XL., rule 10, is tolerably plain in its terms. At a trial with a jury there may be a misdirection by the judge, and there may be a wrong finding by the jury. In either case the party injured must apply for redress to the Divisional Court. That Court may think either that there has been or that there has not been a miscarriage; but the Court may also think that the most convenient course will be to decide upon the whole case, and that the proper materials being before them they ought to enter judgment in accordance with the view taken by them. Rule 10 does not clash with rule 4 as remodelled; that rule only applies where the judge has entered a judgment, which is not warranted by the findings of the jury.

BRETT, L.J. I am of the same opinion, and for the same reasons. Rules 4 and 10 seem to me consistent with each other. I think it quite competent for a Divisional Court to enter judgment upon special findings where the unsuccessful party has moved for a new trial, provided they have all the materials before them necessary for finally determining the questions at issue between the parties.

COTTON, L.J., concurred.

The appeal was then heard upon the merits, and ultimately the Lords Justices reversed the decision of the Queen's Bench Division, and restored the judgment of Denman, J.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

Solicitor for defendants: *Wynne, for Forshaw & Hawkins, Liverpool.*

[IN THE COURT OF APPEAL.]

1879
Dec. 11.

WALKER AND OTHERS *v.* BUDDEN.

Practice—Appeal from Chambers to High Court—Party Appealing not Appearing in High Court to support Notice of Motion—Hearing in Court of Appeal.

If a party appealing from the decision of a judge at chambers does not appear in the High Court to support the motion, and judgment is thereupon pronounced against him in his absence, he cannot afterwards appeal to the Court of Appeal against the judgment of the High Court: the Court of Appeal has no jurisdiction to afford him relief.

THE writ of summons had been issued to recover large sums of money, which the plaintiffs alleged to be due to them. The defendant did not appear within the prescribed time, but he afterwards applied to a master at chambers for liberty to defend the action: leave to appear was granted upon condition of paying into court or giving security for a portion of the plaintiffs' claim. The defendant appealed to a judge against the condition imposed, who affirmed the master's order. The defendant then gave notice of motion to the Queen's Bench Division. Before the day for hearing the motion arrived, the counsel for the defendant requested by letter the counsel for the plaintiffs to allow it to stand over; the counsel for the plaintiffs, however, replied that his instructions did not permit him to consent to this course. This reply did not reach the counsel for the defendant. On the day for hearing the motion, no counsel for the defendant appearing, the counsel for the plaintiffs claimed the judgment of the Court, and, accordingly, the Queen's Bench Division, consisting of Lord Coleridge, C.J., and Lindley, J., affirmed the decision at chambers. The defendant appealed to this Court.

Torr, for the defendant, stated the above-mentioned facts.

M. Powell, for the plaintiffs, was not called upon to argue.

PER CURIAM (Cockburn, C.J., Bramwell and Cotton, L.JJ.). As the defendant did not appear in the Queen's Bench Division pursuant to the notice of motion, the appeal to this Court cannot

1879

WALKER v. BUDDEN.

be heard: the defendant must apply to the Queen's Bench Division, which possibly, in the exercise of its discretion, may allow the appeal from chambers to be argued. This Court can give the defendant no relief under the circumstances stated.

Appeal dismissed.

Solicitors for plaintiffs: *Gellatly, Son, & Warton.*
Solicitor for defendant: *Horace Chatterton.*

1880
March 15.

THE YORKSHIRE WAGGON COMPANY *v.* THE NEWPORT AND ABERCARNE COAL COMPANY.

Practice—Costs of Parties brought in by Notice under Order XVI., rule 18—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Order XVI., rules* 18, 21.

There is no jurisdiction under the provisions of Order XVI., rule 21, to impose any terms with regard to the payment of the costs of a party brought in by notice under rule 18 upon the party bringing him in.

Quære, whether the provisions of Order XVI. extend to bringing in any parties beyond the third party.

THIS was an action brought to recover possession of certain railway waggons. The defendants gave notice, under Order XVI., rule 18, to the Gloucester Waggon Company, from whom they had purchased the waggons, that they should claim indemnity over against the Gloucester Waggon Company, and that if they wished to dispute the plaintiffs' claim in the action against the defendants they must appear. The Gloucester Waggon Company appeared pursuant to the notice, and the defendants then applied, under Order XVI., rule 21, at chambers for directions as to the mode of having the questions in the action determined. A master made an order giving the third parties leave to appear at the trial and cross-examine the plaintiffs' witnesses, and that the costs should be in the discretion of the judge at the trial. The Gloucester Waggon Company then gave notice, under the provisions of Order XVI., rule 18, to Messrs. Beynon & Co., from whom they had purchased the waggons, and they appeared in the action. A similar order was made by the master with respect to

the fourth parties to that which had been made with respect to the third parties. The fourth parties then proceeded to give notice, under the provisions of Order XVI., rule 18, to one Bailey, from whom they had purchased the waggons, and he appeared in the action. A similar order was made by the master with regard to the fifth party to that which had been made with regard to the fourth parties. At the trial the third party did not appear, but the fourth and fifth parties appeared by counsel, and the defendants succeeded on the evidence of the fifth party, who proved a sale to himself by the vendor of the waggons to the plaintiffs anterior to the sale to the plaintiffs. Lush, J., who tried the case, ordered at the trial that the fourth parties should pay the fifth party's costs, and that the third parties should pay the fourth parties' costs, including the costs paid by the fourth parties to the fifth party. Some days after the trial the third parties applied to Lush, J., for and obtained an order that the defendants should pay their costs, including the costs they had to pay to the subsequent parties. Against this order—

March 8. *Fullarton*, for the defendants, moved by way of appeal. The judge was functus officio after the trial, and had no jurisdiction to make the order. [In the course of his argument a doubt was suggested by Lush, J., after considering the provisions of the Judicature Act, 1873, s. 24, sub-s. 3, and Order XVI., whether there was any power to bring in fourth and fifth parties.] It is submitted that there is no power to bring in any party beyond a third party. In *Fowler* v. *Knoop* (1) a fourth party was allowed to be brought in, but doubts were expressed as to whether this could be done in *Walker* v. *Balfour*. (2) See also *Treleaven* v. *Bray*. (3)

If the proceedings were void with regard to the fourth and fifth parties, there can be no power to order defendants to pay their costs.

Finlay, for the third parties, shewed cause. What the third parties object to is the order that they shall pay the costs of the fourth and fifth parties. If the original order of Mr. Justice Lush

(1) 36 L. T. (N.S.) 219; W. N. 1877, p. 68.

(2) 25 W. R. 511.

(3) 45 L. J. (Ch.) 113.

1880

YORKSHIRE WAGGON CO. v. NEWPORT COAL CO.

at the trial is held void on the ground that the fourth and fifth parties could not be brought in, the third parties are content.

THE COURT then postponed the further hearing that the fourth and fifth parties, who were not represented, might have an opportunity of arguing the question whether there was any power under the rules to bring in fourth and fifth parties.

March 15. *J. Edge*, for the fourth and fifth parties. By the definition of "defendant" in the Judicature Act, 1873, s. 100 "defendant" includes any person served with notice of or entitled to attend any proceedings. That definition is by Order LXIII. applied to the rules. Therefore, when the third party is brought in under Order XVI., he becomes a defendant with all the rights of a defendant, including that of in his turn bringing in another party to be bound by the findings in the action. The policy of the Act is that questions should as far as possible be determined once for all between all parties interested in one action, instead of its being necessary that there should be several actions. *Fowler* v. *Knoop* (1) is an authority directly in point.

COCKBURN, C.J. I think the rule must be made absolute, and the orders of my Brother Lush with regard to the payment of the costs of the parties brought in must be rescinded. It seems to me clear that the master had no authority to make the order which he did, giving the judge at the trial discretion as to the costs of the third and subsequent parties. There is no provision for imposing any terms except upon the party seeking to come in and defend the action. I can find no authority given, either by statute or by the rules, to make the defendant pay costs as between himself and the other parties who may come in as parties to the action under the provisions of Order XVI. I am not at all sure that there ought to be any such provision as to costs. It is entirely optional whether a party to whom notice has been given will come in or not. The defendant gives notice to the third party that the plaintiff is suing him, and that, if the plaintiff succeeds, he will claim his remedy over against the third party,

(1) 36 L. T. (N.S) 219.

and that, if such party likes to come in and make himself a defendant, for the purpose of fighting the question in which he is interested, he may do so, but if he does not choose to do so he will be bound by the result of the action with regard to such question. The defendant cannot compel him to come in. It is optional with him to do so, and if he chooses to come in it seems doubtful whether there is any good reason why he should be entitled to call on the defendant to pay costs to him. I am not sure, therefore, that there is any omission in the provisions of the rules in this respect, but however this may be, I can see no provision giving authority to the master to make this order.

LUSH, J. I acted in making the orders which I made as to costs upon the orders made by the master, by which in the case of each party brought in he ordered that the costs should be in the discretion of the judge at the trial. I took that to import a discretion to say whether the party brought in should pay or receive costs. I quite agree that such an order is ultrà vires. The 21st rule of Order XVI. says that the "Court or judge upon the hearing of such application may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just," &c. There is nothing expressly said about costs, and if there is any power with regard to costs it must be under the words, "on such terms as shall seem just." This might mean on the terms that the party brought in shall pay costs, but it cannot mean that any liability to pay costs may be imposed on the party who brings him in.

MANISTY, J., concurred.

Rule absolute.

Solicitor for defendants: *Gething.*
Solicitor for third party: *E. Doyle.*
Solicitors for fourth and fifth parties: *Hunt & Son, for Lynes.*

1880

March 18.

GREER *v.* POOLE AND OTHERS.

Ship—Marine Insurance—Loss by Perils of the Sea—Payment in respect of Bottomry Bond—Foreign Law how far applicable to English Policy.

A policy of marine insurance was effected with English underwriters by an English merchant upon goods shipped in a French ship, and it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision and put into port for repairs, the cargo, however, being uninjured. The master, not having funds to do the necessary repairs, gave a bottomry-bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods:—

Held, that the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, and that there being no loss by perils of the sea according to English law, the assured could not recover from the underwriters the amount which he had paid as above-mentioned.

ACTION upon a policy of marine insurance.

The facts sufficiently appear from the judgment.

May 16, 27, 1879. *Cohen, Q.C.*, for the plaintiff. It must be admitted that this loss was not general average, but it is contended under the circumstances this was a loss by perils of the sea. By reason of perils of the sea the goods got into the hands of others, from whom the owner could not recover them without paying the amount necessary to satisfy the bond. It is like money paid to salvors. By the French law the shipowner is entitled to abandon the ship and freight to the bondholder, and may, by so doing, relieve himself from all further liability.

Actual sea damage to the goods themselves is not necessary to constitute loss by perils of the sea: *Dent* v. *Smith* (1); *Rodoconachi* v. *Elliott*. (2) There is no authority to shew that in such a case as this the loss is not by perils of the sea. If this is not a loss by perils of the sea according to the English law it is by French law, and it is contended that the goods being on board a French ship, the policy must be construed according to French law: *Lloyd* v. *Guibert*. (3) (4)

(1) Law Rep. 4 Q. B. 414.
(2) Law Rep. 9 C. P. 518.
(3) Law Rep. 1 Q. B. 115.
(4) Various citations were made from the Code de Commerce and other French authorities with relation to the

English Harrison, for the defendants. The policy was an English policy effected by an English merchant with English underwriters, and must be construed according to the English law, except so far as the parties have stipulated to the contrary. It is expressly stipulated that general average shall be according to judicial foreign statement, but what under this policy amounts to a loss by perils of the sea must depend on English law. The cases of *Powell* v. *Gudgeon* (1), and *Sarquy* v. *Hobson* (2), are in point of principle conclusive authorities to shew that this was not a loss by perils of the sea. [He also cited *Harris* v. *Scaramanga*. (3)]

Cur. adv. vult.

March 18. The judgment of the Court (Cockburn, C.J., and Lush, J.) was delivered by

LUSH, J. This is an action on a marine policy on goods on a voyage from Lagos to Marseilles in a French ship. By the terms of the policy general average was to be payable as per judicial foreign statement.

The ship having come into collision with another ship put into Gibraltar for repairs. The cargo was undamaged. The master not having funds enough to do the necessary repairs, took up a loan on bottomry upon ship, freight, and cargo. On arrival at Marseilles the bondholder took proceedings to enforce his rights against ship, freight, and cargo, and ship and freight proving insufficient to satisfy the bond, the plaintiff had to pay the deficiency in order to release his goods. A judicial average statement was made out at Marseilles, which, however, did not comprise the sum paid to the bondholder, as the payment had not then been made. The defendants paid into court a sum sufficient to satisfy the claim for particular charges and expenses and general average under the adjustment, and the only question submitted to us is whether the amount paid to release the goods is

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French law, but as the Court held that the French law was not applicable, it is not thought necessary to refer to these authorities.

(1) 5 M. & S. 431.
(2) 4 Bing. 131.
(3) Law Rep. 7 C. P. 481.

1880

GREER v. POOLE.

recoverable under the policy. On the argument, Mr. Cohen, who appeared for the plaintiff, feeling that he could not sustain the claim as general average, contended that this was under the particular circumstances a loss by perils of the sea, the circumstances relied on being that the French law entitled the owner of the vessel in question to abandon the ship and freight to the bondholders and thus to release himself from further liability, the French law differing in this respect from English law. Whether this contention is well founded or not is not in our opinion material; for, supposing it to be so, it does not make the loss a loss by perils of the sea. The proximate cause of the loss, to which alone our law has regard, was the inability of the agent of the shipowner to pay off the charge which he had for want of funds at Gibraltar created on the cargo. The goods sustained no sea damage.

It was further contended on behalf of the plaintiff that, as the policy was upon goods in a French ship, it must be construed as if it had been a French policy, and that under such a policy the loss would have been deemed a loss by perils of the sea.

Whether a French policy would have been so construed is again immaterial. It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average, but except when it is so stipulated the policy must be construed according to our law and without regard to the nationality of the vessel. Our judgment is therefore for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Gregory, Rowcliffe, & Co.*
Solicitors for defendants: *Parker & Co.*

GOLDSTRAW, APPELLANT; DUCKWORTH AND ANOTHER, RESPONDENTS. 1880

March 23.

Local Government Acts—Projection in Front of Building over Pavement—Absence of Obstruction to Traffic—5 Vict. s. 2, c. xliv.

A local Act for the promotion of health and the regulation of buildings in a borough enacted, after making various provisions for the prevention of nuisances upon the pavements of streets, that no projection should be made in front of any building over or upon the pavement:—

Held, that this enactment did not apply to projections from the front of a building which were too high up to interfere with free passage along the footpath.

CASE stated by the stipendiary magistrate of Liverpool, under 20 & 21 Vict. c. 43.

An information had been laid by the appellant against the respondents, who were the architects employed in the erection of a certain hotel in Liverpool, for contravening the provisions of the 67th section of a local Act, entitled "an Act for the promotion of the health of the inhabitants of the borough of Liverpool and the better regulation of buildings in the said borough" (5 Vict. s. 2, c. xliv.) The section in question was as follows: "And be it enacted that no projection of any kind shall be made in front of any building over or upon the pavement of any street except for shop fronts or for doorways, and no part of such shop front or doorway in streets under ten yards wide (measuring from house to house at right angles with the front brick or stone work of the said buildings) shall project more than six inches except the cornice, which may project fifteen inches, and in streets more than ten yards wide, measuring as aforesaid, no shop front or doorway shall project more than twelve inches except the cornice, which may project eighteen inches, the tops of such projecting cornices in no case to exceed in height more than three feet above the ceiling of such shop, and being in all cases covered with lead, copper, zinc, iron, slate, stone, or other incombustible material. Provided always that it shall be lawful for any person with the consent in writing of the council, certified by a copy of some resolution in writing of the council, certified under the hand of the town clerk, and also with the consent of the commissioners for the better paving and sewerage of the town of Liverpool, certified by a copy of some resolution in writing of the said commissioners, certified under the hand of their clerk, to build with or add to any

1880

GOLDSTRAW v. DUCKWORTH.

building fronting any street, any projecting pilaster which shall not project more than six inches, or in streets more than ten yards wide, measuring as aforesaid, more than twelve inches from the perpendicular line of the front brickwork or stonework of the building where it fronts such street, &c."

It was proved on the hearing of the information that the projection complained of was an oriel window of stonework, which measured from the bottom to the top eleven feet and projected over the pavement of the street two feet six inches, and the distance between the lowest part of the window and the footpath was fourteen to fifteen feet, and that such oriel window was not in the nature of a shop front, doorway, cornice, or pilaster. It was, however, proved that the window was not any nuisance or obstruction, except only so far as any such projection necessarily interferes with the access of light and air to the street and with the regularity of the line of the buildings in the street, and that it did not interfere with the free use of the footpath. The magistrate was of opinion that the 67th section of the Act only prohibited projections either placed upon the pavement or in such manner over it as to prevent the free passage along it, and that it did not apply to projections in the upper part of buildings, and he accordingly dismissed the information. The question for the Court was whether the 67th section of the Act prohibited projections which, though not obstructing or resting upon any part of the footpath, project from the upper part of buildings over the footpath.

March 17. *R. S. Wright*, for the appellant, contended that the 67th section was intended to regulate buildings, and not merely to prevent obstruction to streets, and that it applied to all projections over the pavement, and not only to such projections as obstructed the passage along it.

No counsel appeared for the respondents.

Cur. adv. vult.

March 23. The judgment of the Court (Cockburn, C.J., Lush and Manisty, JJ.) was delivered by

LUSH, J. The question is whether the 67th section of the local Act applies to the present case. The Act has other than sanitary objects, and, among other matters, it provides for the regulation of

the footways. The 67th section is one of a string of sections having reference to the footways. The 63rd section provides that no water shall be allowed to flow from any building upon the footway of any street, but all such buildings shall be drained by pipes or tunnels, &c., and the 64th section provides how such pipes and tunnels shall be laid in the streets or highways. The 65th section prohibits the discharge of smoke or steam from the front of buildings into the street. The 66th section provides as to cellar openings and openings of all buildings to the front of the street, and the coal and other vaults under the footway of any such street. It is contended by the appellant that the words "over or upon the pavement of any street," apply to any projection whatever in front of a house erected for any purpose, however innocent, if it extends any distance over the pavement. If this construction were correct, there could not be a lamp over a shop projecting over the pavement, or any other projection of a similar nature. We think, on looking at the Act, that was not the object of the section. The object of the string of sections, of which the 67th is one, appears to us to be to keep the pavement clear for the foot passengers, and to prevent obstructions to the passage of the street. The words "over or" appear to have been inserted to prevent the Act being evaded by putting obstructions a little above the pavement but not exactly upon it. The exceptions in favour of shop fronts seem to favour this construction. It never can have been intended to prevent such projections as verandahs or small balconies for flowers and so forth, and if it had been intended to prevent projections at any height over the footpath, one would have expected to find an exception in favour of these little harmless projections as well as of shop fronts and doorways. For these reasons we think that the magistrate was right in thinking that the section is not intended to secure the free passage of light and air, but to secure the free passage of the public along the pavement. The words, as it seems to us, must be read as if they ran "over or upon the pavement so as to obstruct the passage along it." On these grounds we think the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *F. Venn & Son.*

1880
March 5;
April 7.

CHAPMAN *v.* THE GREAT WESTERN RAILWAY COMPANY.
CHAPMAN *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Carrier—Railway Company—Goods destroyed by Fire—When a Carrier ceases to be liable as such and becomes a Warehouseman.

A package of goods was delivered to the Great Western Railway Company and another to the London and North Western Railway Company for carriage to the station of the former company at W., both packages being addressed to the plaintiff "to be left till called for." One of the packages arrived at W. on the 24th of March, the other on the 25th. On their arrival they were placed in the station warehouse to await their being called for. The defendants did not know the address of the plaintiff, who travelled about the country with drapery goods. The goods had not been called for when, on the morning of the 27th of March, a fire having accidentally broken out, the warehouse was burned down and the goods were consumed by fire. The plaintiff on the same day after the fire called for the goods and, not receiving them, brought actions against the defendant companies as common carriers to recover their value:—

Held, that, after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and consequently that the actions were not maintainable in the absence of any evidence of negligence on the part of the defendants.

MOTION for judgment in both actions.

The action in both cases was by the consignee of goods against the railway company as common carriers for non-delivery of goods entrusted to them for carriage. The facts sufficiently appear from the judgment.

Poole, for the plaintiff, moved for judgment. The question is, whether the goods when they were destroyed were in the possession of the defendants as common carriers or as warehousemen. It is submitted that a reasonable time must be allowed to the consignee for taking delivery before the liability of the defendants as carriers comes to an end, and they become warehousemen. In this case the defendants accepted the goods upon the terms that they were to be left until called for, and the plaintiff was entitled to a reasonable time to call for them. The plaintiff cannot by unreasonable delay in taking delivery prolong the liability of the defendants as carriers, but it is submitted that a reasonable time had not elapsed, and that the plaintiff was not in morâ. [He cited

Mitchell v. *Lancashire and Yorkshire Ry. Co.* (1), *Bourne* v. *Gatliffe* (2), *Hyde* v. *Trent Navigation Co.* (3), and *Garside* v. *Trent and Mersey Navigation Co.* (4)]

Kinglake, for the defendants. If the plaintiff does not take delivery within a reasonable time after the arrival of the goods the liability of the defendants as carriers is at an end. The fact that the goods were to be left till called for cannot prolong the liability of the defendants as carriers. It is contended that a reasonable time for taking delivery had elapsed in this case. [He cited *In re Webb.* (5)]

Cur. adv. vult.

April 7. The judgment of the Court (Cockburn, C.J., Lush and Manisty, JJ.) was delivered by

COCKBURN, C.J. These two cases depend on the same facts and involve the same point. The facts are not in dispute, and lie in a word; but they give rise to a question of considerable importance.

The plaintiff travels about the country with drapery goods. A package of such goods was delivered to the defendants, the Great Western Railway Company, at Bristol, to be forwarded from thence by their line to their station at Wimborne. A second such package was delivered to the defendants, the London and North Western Railway Company, to be forwarded from London to the station of the Great Western Company at Wimborne. Both were addressed to the plaintiff; both were directed "to be left till called for." The one from Bristol arrived on the 24th of March, the one from London on the 25th. On their arrival they were placed in the station warehouse to await their being called for. They had not been called for when, on the morning of the 27th, a fire having accidentally broken out, the warehouse was burned down, and the plaintiff's goods were consumed by fire.

The plaintiff brings his action against both defendants on their liability as common carriers, contending that that liability still subsisted when the goods were destroyed.

(1) Law Rep. 10 Q. B. 256.
(2) 4 Bing. N. C. 314; 3 M. & G. 643; 11 Cl. & F. 45.
(3) 5 T. R. 389.
(4) 4 T. R. 581.
(5) 8 Taunt. 443.

1880

CHAPMAN v. GREAT WESTERN RAILWAY CO.

The plaintiff was aware that the goods were coming. He called on the 22nd to inquire after them, but found that they had not yet arrived. He called again in the course of the 27th, but the goods had been destroyed that morning.

The question is, whether the goods in question are to be considered as having been in the custody of the defendants as carriers —in which case the defendants would be liable for the loss, though not arising from any default of theirs—or as warehousemen—in which case they would be liable only for want of proper care, which is not alleged to have been the case here. The facts not being in dispute, it was arranged on the trial at Nisi Prius that a verdict should pass for the plaintiff for the value of the goods in each case, but that the question of law as to the liability of the defendants should be reserved for the decision of this Court on an application for judgment.

The question of where the liability of the carrier ceases, or rather becomes exchanged for that of an ordinary bailee for hire, is sometimes one of considerable nicety and by no means easy of solution. We are not, however, embarrassed in the present case by any consideration as to an undertaking to forward the goods, such as arose in *Garside* v. *Trent and Mersey Navigation Co.* (1) or as to any obligation on the part of the company to give notice of their arrival, which was one of the points which arose in *Bourne* v. *Gatliffe.* (2) It is plain that the delivery was to be made at the station to which the goods were addressed, and to the plaintiff himself, or some one duly authorized on his behalf. Nor does any question arise as to the readiness of the defendants to deliver. The goods had arrived safely, and were ready for delivery, had they been called for, down to the time of the fire. It is not suggested that the defendants were under any obligation to give notice to the plaintiff of the arrival of the goods. Nor, indeed, could they have done so. He was not a resident at Wimborne, nor did they know his address. He was going about the country on his business between the time of the arrival of the goods and that of their destruction. No evidence was offered at the trial of any prior course of dealing between the parties, or of any established

(1) 4 T. R. 582. (2) 3 M. & G. 643.

practice on the part of the railway company in dealing with goods addressed to, and to be delivered at, the station. We have therefore to consider the question with reference to general principles alone.

The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure—sometimes one of considerable duration. Next there is the time which in most instances must necessarily intervene between their arrival at the place of destination and the delivery to the consignee, unless the latter—which, however, is seldom the case—is on the spot to receive them on their arrival. Where this is not the case, some delay, often a delay of some hours—as for instance when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload—unavoidably occurs. In these cases, while, on the one hand, the delay being unavoidable cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee, on the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of carrier. A fortiori, will this be the case where there is unreasonable delay on the part of the carrier, if the consignee is ready to receive.

The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night time, or of which the arrival is uncertain, as of goods coming by sea, or by a goods train, the time of arrival of which is liable to delay. On the other hand, he cannot, for his own convenience, or by his own laches, prolong the heavier liability of the carrier

1880

CHAPMAN v. GREAT WESTERN RAILWAY CO.

beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance—at all events where the carrier has no means of communicating with him—which was the case in the present instance—cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time. When once the consignee is in morâ by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such it must depend on the circumstances of the particular case.

Such being the general rule, it is of course competent to the parties to modify that contract by the introduction of any terms or conditions they may please. The question arises whether they have done so, and, if so, to what extent in the present instance. The goods were specially directed "to be left till called for." What is the meaning of these words? What effect, if any, have they on the contract, as affecting the liability of the defendants? In our opinion none. They amount to no more than an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station. They are words which have been long in use, and had their origin in former times when the carrier generally had his office in the town to which he carried, and was in the habit of delivering at the house or place of business of the person to whom goods were addressed. To prevent goods, which it better suited the convenience of the consignee to receive at the office of the carrier—more especially when he had no residence or office at the particular place—from being sent out for delivery, and possibly misdelivery, and to insure their being kept at the office of the carrier ready for delivery, they were specially so addressed. There are still places at which railway companies send out goods from the station. The consignors of the goods now in question were probably unaware whether the defendant company did so at Wimborne, or not. They no doubt knew that the plaintiff did not reside, or carry on

business there, except in passing. They were probably aware that he was going about the country with his goods, and that it was uncertain at what precise moment it would suit him to receive them. They therefore directed them to be left at the station till called for—obviously for the plaintiff's convenience, not for that of the company. No doubt some effect must be given to the words. Having contracted to carry the goods subject to the condition of keeping them till called for, the company would be bound to keep them—possibly not for an indefinite, but at all events for a reasonable time. But in what capacity? As carriers or as warehousemen? In our opinion no change in the conditions of liability is introduced by these words. It would be in the highest degree unreasonable that the company, having agreed to keep the goods for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that they undertook to keep the goods till it suited the convenience of the plaintiff to take them away, with the intention of prolonging their responsibility throughout the time whatever it might be. In our opinion, as soon as a reasonable time for delivering had passed, the defendants were fully entitled to treat their responsibility as carriers as at an end, and exchanged for that of warehousemen.

This brings us to the question of what under the circumstances would be a reasonable time. Now, the fire happening on the morning of the 27th of March, one of these packages had been lying at the station since the 24th, the other since the 25th. If the plaintiff, who expected these goods, had called for them on the 26th, and had not had them delivered to him, and had sustained a loss in consequence, he would have had a good ground of complaint against the company, inasmuch as they would then have had full time to unload the goods and to have them ready for delivery. The reason he did not do so was that he was following his business elsewhere; but for which he would have fetched his goods away. It seems to us that there must be a corresponding obligation on his part, and that he was consequently in morâ and must put up with the loss, as resulting from his own delay, instead of throwing it on the company.

This view of the case receives support from the decision of the

1880

CHAPMAN v. GREAT WESTERN RAILWAY CO.

Court of Common Pleas in *Re Webb* (1), which, in principle, is quite analogous to the present case though the facts are not precisely the same. There the defendants, the carriers, in order to obtain their exclusive custom had agreed with the plaintiffs to store all goods arriving for them in the defendants' warehouse free of charge, till it suited the plaintiffs to take them away. A fire having accidentally broken out, and goods of the plaintiffs, which had been lying at the defendants' warehouse upwards of a month, having been destroyed, it was held that the goods having been in the keeping of the defendants for the convenience of the plaintiffs, the defendants were not liable for the loss. Here, too, the goods were equally in the keeping of the defendants for the convenience of the plaintiff, and the same result must ensue.

Judgment for the defendants.

Solicitors for plaintiff: *Clifton & Carter.*
Solicitor for defendants: *Hall.*

March 19.

[IN THE COURT OF APPEAL.]

BABCOCK AND OTHERS *v.* LAWSON AND ANOTHER.

Pledge of Goods—Pledgor and Pledgee—Goods obtained by Fraud from Pledgee and re-pledged.

D. & Co. deposited certain goods with the plaintiffs as security for an advance; they afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment. D. & Co. obtained an advance from the defendants, and deposited the goods, with a power of sale, with them:—

Held, affirming the judgment of the Queen's Bench Division, that as the plaintiffs had parted with their special property in the goods to D. & Co., they could not recover them in an action from the defendants who had obtained them bonâ fide and for a good consideration.

APPEAL from the judgment of the Queen's Bench Division in favour of the defendants. (2)

Action for the conversion of a quantity of flour alleged to be the property of the plaintiffs.

(1) 8 Taunt. 443. (2) 4 Q. B. D. 394.

The plaintiffs, merchants at Liverpool, had lent to the firm of Denis Daly & Sons, also merchants at Liverpool, their acceptances for the sum of 11,500*l.* on the security of certain flour, which was accordingly warehoused in the name of the plaintiffs, in a room let to them for that purpose, and of which they kept the key and paid the rent.

On the 13th of May, 1878, one of the firm of Denis Daly & Sons, applied to the defendants to advance them a sum of 2500*l.* on the security of the flour deposited with the plaintiffs, but without communicating to them the fact of the flour having been so deposited.

The defendants in entire ignorance of this fact, and believing the flour to be the property of Denis Daly & Sons, agreed to advance the 2500*l.* on the security of the flour, but on the terms that they were to have absolute possession of the flour and to warehouse it in their own name, and to have power to sell it.

For the fraudulent purpose of obtaining possession of the flour, one of the firm of Denis Daly & Sons, brought to the plaintiffs a memorandum as follows:—

"14 May, 1878. We have sold R. & J. Lawson 1500 sacks of Baltic Whites, payment as follows: 1000*l.* upon delivery; 1000*l.* in 14 days; 1000*l.* in a month, which amounts we will hand you as received."

The plaintiffs by this fraudulent misrepresentation were induced to part with the flour, and gave Denis Daly & Sons a delivery order for the same, and directed the landlord of the warehouse to transfer the room in which it was deposited to Lawson & Co., and this was accordingly done.

The defendants then advanced Denis Daly & Sons 2500*l.*

Chalmers, for the plaintiffs.

Warr, for the defendants.

The arguments were the same as in the Court below. The following cases were cited: *Fowler* v. *Hollins* (1), *Cundy* v. *Lindsay* (2); *Cooper* v. *Willomatt.* (3)

(1) Law Rep. 7 H. L. 757. (2) 3 App. Cas. 459.
(3) 14 L. J. (C.P.) 219.

1880

BABCOCK v. LAWSON.

BRAMWELL, L.J. This is a very plain case. The action is only maintainable by the plaintiffs in respect of the property they have in the goods. The defendants have entered into no contract with them. The plaintiffs had only a special property as pledgees, that property they gave up under a fraud, and had the pledgors still retained the goods, they could have resumed them. They might have said, You the pledgors have got these goods by a fraud, and our special property in them is not divested; but they cannot say that against a person who has obtained possession of them from the pledgors bonâ fide. The case is somewhat analogous to that where a person is induced to part with his goods by fraud, the contract is voidable and he can recover back the goods; but if the person who has fraudulently obtained the goods part with them to a bonâ fide purchaser, the purchaser can hold the property against the person defrauded. By analogy the plaintiffs cannot recover in this case.

BAGGALLAY and THESIGER, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Rawle.*
Solicitors for defendants: *Field & Roscoe, for Bateson.*

March 24.

[IN THE COURT OF APPEAL.]

ATWOOD AND OTHERS *v.* SELLAR & CO.

Marine Insurance—General Average—Expenses of warehousing and reshipping Cargo, of Pilotage, and other Charges on Vessel leaving Port.

Where a vessel goes into a port of refuge, in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average.

So *held*, affirming the judgment of the majority of the Queen's Bench Division.

APPEAL from the judgment of the Queen's Bench Division in favour of the plaintiffs. (1)

(1) 4 Q. B. D. 342.

The special case stated that the action was brought by the plaintiffs as owners of the ship *Sullivan Sawin*, to recover 13*l.* 14*s.* 9*d.*, in respect of a general average contribution, from the defendants, as owners and consignees of certain goods on board that vessel.

The vessel, while on her voyage from Savannah for Liverpool, encountered severe weather, and in consequence a general average sacrifice became necessary and was made, the master being compelled to cut away the foretopmast. The vessel therefore put into Charlestown on the 21st of February, 1877, to repair the damage. In order to effect these repairs and enable the vessel to prosecute her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping the same; and further expenses were incurred at Charlestown for pilotage and other charges paid in respect of the ship leaving port and proceeding on her voyage.

The case of the *Sullivan Sawin* was put into the hands of an average adjuster to prepare the adjustment, which he did, charging the whole of the expenses to general average, and the plaintiffs brought this action to recover the contribution due from the defendants in respect of their goods upon the footing of that adjustment. The defendants were willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters, which was stated in the case to be as follows: It is, and for from seventy to eighty years past has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average; the expense of warehousing it as particular average on the cargo; the expense of reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendants a contribution in excess of what would be payable according to the practice of British average adjusters as stated in the case.

1880

ATWOOD v. SELLAR.

Feb. 23, 24, 25, 26. *Cohen, Q.C.*, and *J. C. Mathew*, for the plaintiffs.

Butt, Q.C., and *Fullarton*, for the defendants.

The arguments are fully stated in the judgment.

The following cases were cited in addition to those mentioned in the judgments: *The Copenhagen* (1); *Newman* v. *Cazelet* (2); *Simonds* v. *White* (3); *Mavro* v. *Ocean Marine Insurance Co.* (4); *Wilson* v. *Bank of Victoria* (5); *Blasco* v. *Fletcher.* (6)

Cur. adv. vult.

March 24. The judgment of the Court (Bramwell, Baggallay, and Thesiger, L.JJ.) was delivered by

THESIGER, L.J. The question raised by this appeal is, whether in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average also.

The matter came before the Court below in the form of a special case, and upon it the Court decided in favour of the plaintiffs, who assert that the expenses in question are the subject of general average. The special case states a long continued practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average; and the expense of warehousing it as particular average on the cargo, and the expense of the reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. It was not, however, and could not reasonably be contended for the defendants, that the practice could be put so high as a custom impliedly incorporated in the contract between

(1) 1 C. Rob. 289.
(2) Park. Ins. 900, 8th ed.
(3) 2 B. & C. 805.
(4) Law Rep. 9 C. P. 595.
(5) Law Rep. 2 Q. B. 203.
(6) 14 C. B. (N.S.) 147.

1880

ATWOOD v. SELLAR.

the parties, and during the course of the argument we intimated our opinion, founded on the language of the special case with regard to this practice, and especially the language of the fifth paragraph, that the question between the parties must be decided in accordance with legal principles and authority which the practice of the average adjusters professes to follow. The law governing the case is admittedly English law, for the expenses in dispute arose upon a voyage the proper and actual termination of which was an English port. As a matter of principle we are clearly of opinion that the judgment of the majority of the Court below in favour of the plaintiffs was right. The principle which underlies the whole doctrine of general average contribution is that the loss immediate and consequential caused by a sacrifice for the benefit of cargo, ship and freight, should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to the vessel to enable it to proceed on its voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded; and that general average ceases at the point of time when the common danger is at an end. The proposition is, as will appear later, sound when applied to cases in which a ship is damaged by a peril of the sea, and before any voluntary sacrifice, such as putting into an intermediate port, is made, the goods are unshipped and in safety; but its application to a case like the present is not admissible. A vessel which has put into port to repair an injury, occasioned by a general average sacrifice, may be, and generally is, when in port in perfect safety; and if by the expression "common danger" be meant danger of actual injury to vessel and cargo, there is no more danger to the goods when on board the vessel being in port than when stowed in a warehouse on shore; and, indeed, in many cases only a portion of the goods is removed from the vessel in order to do the repairs to her, while the remainder of the goods is left on board. If, on the other hand,

1880

ATWOOD v. SELLAR.

by "common danger" be meant the danger of the vessel with her cargo being prevented from prosecuting her voyage, then there is no more reason why the expenses of warehousing and reloading, and the expenses incurred for pilotage and other charges paid in respect of the vessel leaving port and proceeding on her voyage, should not constitute general average, than there is reason for saying that unloaded and warehoused goods should not contribute, as it is clear in a case of a voluntary sacrifice that they must, to the expenses of the necessary repairs to the vessel. Both classes of expenses are extraordinary expenses consequent upon the voluntary sacrifice, and necessary for the due prosecution of her voyage by the vessel with her cargo. Neither class can, as a general proposition, be said to be incurred exclusively for the benefit of either vessel or cargo. In some cases it might be for the interest of a shipowner to terminate the voyage at the port where his vessel puts in to repair a disaster, while it might be all important for the goods' owner to have his goods carried on by the same vessel. In other cases the position of the parties in this respect might be reversed; but however this may be, the going into port, the unloading, warehousing, and reloading of the cargo and the coming out of port, are at all events parts of one act or operation contemplated, resolved upon, and carried through, for the common safety and benefit, and properly to be regarded as continuous. The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose, being ex hypothesi consequent upon a damage voluntarily incurred for the general advantage, should legitimately be the subject of general average contribution, or, to use the language of Lord Tenterden in his work on shipping, "if the damage to be repaired be in itself an object of contribution it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal." But it is said for the defendants that if this be so, and the principle be carried out to its logical consequences, expenses incurred for wages of crew and provisions should equally form the subject of general average, and that inasmuch as it is, as they suggest, undeniable that they do not, the principle itself must either be

faulty or at least not recognised in English law. As a matter of fact it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our Courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average; but even if the assertion were correct the conclusion drawn would by no means follow.

That the principle in question is not faulty we have endeavoured to shew in the observations already made, and the view we have taken upon the point is strongly confirmed by the fact that it is recognised and carried to its so-called logical consequences as regards the wages of crew and provisions in all other countries than our own.

That the principle is not recognised in English Law is not proved by shewing that expenses incurred for wages of crew and provisions have been under certain circumstances disallowed as the subject of general average, unless it be shewn, which it has not been to us, at the same time that they have been disallowed upon grounds that negative the principle, and it is disproved if it be found that, notwithstanding such allowance, the expenses in question in this case have been allowed. All that in such a case can be said is, that either the Courts have made a mistake in limiting the application of the principle, or that its limitation is due to some real or supposed rule of public policy.

If, then, the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated, and it at least may fairly be asked what other principle, if it be not correct, is to be substituted in its place.

But the authorities remain to be considered; and it is the more necessary that they should be examined with attention, seeing that the practice of the average adjusters professes to follow them.

In *Plummer* v. *Wildman* (1) a ship put back into port to repair damage partly caused by a collision with another ship and partly by a cutting away of part of the rigging of the bowsprit, to which the master was compelled, in consequence of the previous injury due to the collision, and which it was contended for the shipowner

(1) 3 M. & S. 482.

1880

ATWOOD v. SELLAR.

was a general average cause. The cargo was necessarily relanded and warehoused in order that such temporary repairs might be done as would enable the ship to prosecute her voyage; and such repairs having been done, and a portion of the cargo sold to defray expenses, the remainder of the cargo was reloaded and the ship proceeded to her port of destination. Among other expenses claimed as general average, were the expenses of repair necessary to enable the ship to prosecute her voyage, the expenses of unloading and reloading the cargo, the master's expenses, at five dollars per diem, during the unloading, repairing, and reloading, and expenses for crimpage to replace deserters during the repairs. The question for the Court was, whether the case was one of general average, and if so to what extent. It is a little difficult to gather from the judgments in the case what was the exact view of the different members of the Court who delivered judgments, as to the separate heads of claim. Lord Ellenborough appears to have decided that only the captain's expenses in port and crimpage were to be disallowed. Le Blanc, J., said that the unloading might be general average if it were necessary in order to repair the ship, but leaves it in doubt whether the expenses of reloading would or not follow. Bayley, J., deals only with the question how much of the repairs should be allowed as general average, which was the principal question as regards items. Lord Ellenborough, however, laid down that if the return to port was necessary for the general safety of the whole concern, it seemed that the expenses unavoidably incurred by such necessity might be considered as the subject of general average; and that it was not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship without endangering the whole concern from further prosecuting her voyage, unless she returned to port and removed the impediment.

But in the same year as that in which *Plummer* v. *Wildman* (1) was decided, the case of *Power* v. *Whitmore* (2) came before the same Court. In that case the cause of damage was a peril of the sea, and the ship having in consequence of it been compelled to

(1) 3 M. & S. 482. (2) 4 M. & S. 141.

go into port for the safety of ship and cargo, a claim to have the wages and provisions of the crew during the stay in port, and the expenses of repair treated as general average was made. The claim was however disallowed, and Lord Ellenborough, in delivering the judgment of the Court, took occasion to qualify the proposition laid down in *Plummer* v. *Wildman* (1), and to explain and justify the decision in that case, upon the ground that there the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed. The judgment then in *Power* v. *Whitmore* (2) must be taken to recognise that there is, in reference to a port of refuge expenses claimed as general average, a distinction between a case of a vessel putting into a port for repair in consequence of a voluntary sacrifice, and a case of a vessel so putting into port in consequence of an ordinary peril of the seas, although in both cases the putting into port itself may equally give rise to a claim for general average contribution. In *Hallett* v. *Wigram* (3) Cresswell, J., in speaking of *Power* v. *Whitmore* (2), said that Lord Ellenborough had there stated the rule according to what had always been and still was understood to be the law as to general average. Wilde, C.J. (4), in the same case quoted the following passage from Abbott on Shipping, 8th ed. p. 478: "Thus if it be necessary to unlade the goods in order to repair the damage done to a ship by tempest or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held that the expenses of unloading, warehousing, and reshipping the goods, should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage," and added that the reason there assigned might be applicable to the case the author has in his mind: *Plummer* v. *Wildman* (1); but that as a general proposition it was too large. The Chief Justice then pointed out that the decision in *Plummer* v. *Wildman* (1) had been explained in *Power* v. *Whitmore* (2), upon the ground that the expenses were consequent upon a voluntary sacrifice, and then quotes, apparently with approval, the following passage from Abbott, 8th ed. p. 497:

(1) 3 M. & S. 482.
(2) 4 M. & S. 141.
(3) 9 C. B. 580, at p. 607.
(4) 9 C. B. 580, at p. 603.

1880

ATWOOD v. SELLAR.

"It seems to result from these decisions that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average; but if the damage was incurred by the mere violence of the wind or weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner 'to keep his vessel tight, staunch, and strong' during the voyage for which she is hired." The actual decision in *Hallett* v. *Wigram* (1) was, that a claim to general average does not arise where a part of the cargo is sold to raise money at a port to which a ship has put back for the repair of damage incurred by ordinary perils of the sea. That case was decided in 1850, *Power* v. *Whitmore* (2), in 1815, and we have therefore the law, as laid down by the Courts for a considerable portion of the period over which the practice of average adjusters stated in the special case extends, running counter to that practice, by recognising as regards port of refuge expenses a distinction between cases where a ship puts into a port of distress for repair of damage caused by a voluntary sacrifice, and cases where it so puts in for repair of damage caused by peril of the seas; and admitting in the former cases, as a matter of principle if not of express decision, expenses such as those in question in this case to be the subject of general average contribution.

This distinction in principle is to be found asserted by Benecke, who was a member of Lloyd's, in his valuable work on the Principles of Indemnity in Marine Insurance, published in 1824. At p. 191 he says, "if setting aside all laws and received opinions the case is examined merely according to the fundamental maxims which regulate general and particular average, it will in the first instance appear evident that not only all the port charges, such as pilotage, harbour dues, lighterage, &c., but also the charges of unloading and reloading repairs and crew's wages will be general average if the ship put into port for the mere purpose of repairing a damage voluntarily incurred for the general advantage. For all

(1) 9 C. B. 580. (2) 4 M. & S. 141.

these expenses, being the necessary consequences of a measure taken for the general benefit, belong to general average." And then turning to the case where the port is entered in consequence of a particular damage sustained, by which the vessel is rendered unfit to prosecute her voyage, as where masts, sails, or other requisite apparel, are lost in a storm, or a vessel has sprung a dangerous leak, he adds, "all the expenses of entering the port are a subject of general average, being the consequence of a measure voluntarily taken for the preservation of the whole. But as soon as the object of putting the vessel and her cargo in safety is accomplished the cause for general contribution ceases; for whatever is subsequently done is not a sacrifice for the benefit of the whole, or for averting an imminent danger, but it is the mere necessary consequence of a casual misfortune." Benecke then claims the allowance even of wages of crew and provisions where the putting into port is the consequence of a damage belonging to general average; on the other hand, he contends for the disallowance even of the expenses of unloading cargo where it is the consequence of a damage belonging to particular average. In Stevens on Average and Bailey on Average the distinction referred to is not adopted, except as regards the repairs of the ship; but both writers assert as a matter of principle that where a ship necessarily puts into a port to repair damage, whether the original cause of damage be a voluntary sacrifice or an ordinary peril of the sea, the expenses of warehousing and reloading as well as those of unloading the cargo and the outward as well as the inward port charges, should be the subject of general average contribution: see Stevens, p. 22, and Bailey, p. 119. They look not to the more remote damage which undoubtedly was a particular average loss, but to the proximate act of putting into port for the safety of ship and cargo which would belong to general average, and in answer to the argument that their views if logically carried out would lead to the allowance as general average of the cost of the repair of the ship, Bailey, at p. 119, replies that the damage which necessitated that repair being caused by a peril of the sea, the repair should be treated as particular average, but that the ship does not put into the port of refuge because she wants repairs, but because the voyage cannot be continued until she is repaired, or

1880

ATWOOD v. SELLAR.

a total loss of ship and cargo will follow if she does not go into port: he adds, at p. 120, "The immediate cause of putting into the port of refuge is the impossibility of completing the voyage in her then state or the expected total loss of ship and cargo; the damage which the ship has sustained is the remote cause only, for under other circumstances the crew are not justified in putting into port, although the vessel may have sustained damage which it will be necessary ultimately to repair." The views thus expressed are substantially those which are recognised in American law and practice, and they are carried out to the length of including the expense of wages of crew and provisions at the port of refuge in the amount to be contributed for in general average, in all cases where a vessel puts into port for the common safety, whether owing to injury from a peril of the sea or a voluntary sacrifice. See Phillips on Insurance, 3rd ed. s. 1322, 6, 8. To return to the text-writers of this country, Mr. Arnould, in his work on Marine Insurance, 3rd ed. vol. ii. p. 789, after discussing the principles relating to general average says, "from these principles it follows that where a ship has either cut away her masts or rigging, or has been so damaged by a storm that it is necessary for the safety both of ship and cargo to put into a port of distress for repairs, all the expenses inseparably connected with the act of first putting into and afterwards clearing out of such a port of distress give the shipowner a claim to a general average contribution; and this upon the plain ground that these expenses are a necessary consequence of an extraordinary measure taken for the general preservation."

Neither of the already cited cases of *Power* v. *Whitmore* (1), and *Hallett* v. *Wigram* (2), is a direct authority against the proposition just quoted, except so far as the disallowance of the expenses for wages of crew and provisions in the former case can be said to be such; for, as pointed out, the main subject of contention in those cases was the claim for expenses of repair made notwithstanding that such repair was in each case rendered necessary in consequence of injury caused by ordinary perils of the sea; and neither the expenses of unloading, warehousing, or reloading cargo, nor port or pilotage charges, came in question.

(1) 4 M. & S. 141. (2) 9 C. B. 580.

The case of *Hall* v. *Janson* (1), decided in 1855, is, on the contrary, direct authority in favour of the proposition that the expense of reloading as well as of unloading cargo constitutes a claim to general average contribution, even though the original cause of putting into port was a particular average loss. There, in an action upon a policy of marine insurance, a count of the declaration stated that the ship had been damaged by stormy weather and forced to go into a port for repair, in order to enable her to prosecute her adventure and proceed on her voyage, and had there incurred expenses, inter alia, in and about unloading and reloading cargo which was necessarily unloaded for the repair of the ship. This count was upon demurrer held good as shewing the accruing of a general average loss; and Lord Campbell, C.J., in delivering the considered judgment of the Court of Queen's Bench upon the point, said:—"Now the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship that she may be capable of proceeding on the voyage have been held to give a claim to general average contribution; for the acts which occasioned these expenses become necessary from perils insured against, and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight." And after citing *The Copenhagen* (2) *Plummer* v. *Wildman* (3), and Stevens on Average, as authorities in support of the proposition, he added: "This doctrine is quite consistent with what is laid down in *Power* v. *Whitmore* (4) and the other cases relied upon by Mr. Wilde." It is not necessary for us to decide in the present case whether *Hall* v. *Janson* (1) was rightly decided, and whether the expenses in dispute in the present case would properly belong to general average, if the original cause of damage to the ship had only been a cause belonging to particular average. If, however, the Court of Queen's Bench, in the judgment just quoted, and the several text-writers, other than Benecke, from whom we have quoted, are right in the propositions affirmed by them, and the expenses would in such a case belong to general average, it follows, à fortiori, that they would so belong when, as is the fact

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97.
(2) 1 C. Rob. 289.
(3) 3 M. & S. 482.
(4) 4 M. & S. 141.

1880

ATWOOD v. SELLAR.

here, the original cause was a voluntary sacrifice, while, on the other hand, even if the proposition laid down in *Hall* v. *Janson* (1), and supported by the text-writers referred to, were too wide, there would still be left a consensus of opinion to the effect that in such a case as the present at least, the expenses in question must be treated as constituting a claim to general average contribution. In either case the practice of the average adjusters as stated in the special case would be erroneous, and it is to be gathered from a recent edition of a modern work on the law of general average by Mr. Lowndes, himself also an average adjuster of experience, 3rd ed. 107, that as regards port of refuge expenses where the bearing up into port is necessitated by a sacrifice, the principle that they should be treated as general average is apart from his own practice, which gave rise to the present action, at least beginning to be recognised in the practice of adjusters and underwriters. The two cases of *Job* v. *Langton* (2), and *Walthew* v. *Mavrojani* (3), do not really touch the point. In each of these cases a vessel having been accidentally stranded, so that the damage thereby caused was only a particular average loss, was got off and taken into port for repair at considerable expense after the cargo had been unshipped, landed, and warehoused in safety. It was attempted unsuccessfully to make the cargo contribute to such expense as general average. There can be no doubt as to the correctness of the decisions in those cases, for the whole basis of any general average claim was gone as soon as the cargo was unshipped. The vessel was got off and put into port for repair not to avert a loss to the whole adventure, but to repair the particular average damage. Lord Campbell, C.J., delivered the judgment of the Court in *Job* v. *Langton* (4), and in the course of his judgment said, "That the stranding was fortuitous, arising directly from perils of the sea, and that the expenses must therefore, in order to constitute general average, be brought within the category of extraordinary expenses incurred for the joint benefit of ship and cargo." And it is obvious, from the whole judgment, that Lord Campbell not only did not consider that his observations would be applicable to the case of a voluntary sacrifice, but

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97.
(2) 6 E. & B. 779.
(3) Law Rep. 5 Ex. 116.
(4) 6 E. & B. at p. 791.

L.R. 5 C.P. 571

also did not consider that there was any conflict between his then decision and his former judgment in *Hall* v. *Janson*. (1) There is nothing in the judgment in *Walthew* v. *Mavrojani* (2) which alters the case. The result of this review of the authorities is to confirm the opinion which, apart from authority, we entertain and have already expressed upon the question submitted to us. The practice then of the average adjusters, as stated in the special case, appears to us to be neither founded on true principles, nor to be in accordance with the views of the text-writers, and so far as there is case authority upon the matter, it appears to us to be opposed to legal decisions. It is a practice, too, which has not been, as the practice in *Stewart* v. *West India and Pacific Steam Ship Company* (3) was, made a part of the contract between the parties, and therefore constitutes no impediment to our giving effect to the objections to its validity; and in deciding as we do that the judgment of the majority of the Court below was right and should be affirmed, it is satisfactory to us to know that the law, as laid down in the judgment of the Court below and of this Court, is placed upon a footing which more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile and maritime communities.

Judgment affirmed.

Solicitors for plaintiffs: *Field, Roscoe & Co.;* agents for *Bateson & Co., Liverpool.*

Solicitors for defendants: *Parker & Clarke.*

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97. (2) Law Rep. 5 Ex. 116.
(3) Law Rep. 8 Q. B. 88.

1880
March 20.

THE QUEEN [EX PARTE VESTRY OF ST. MARY, ISLINGTON] *v.* J. B. PRICE, AND OTHERS, JUSTICES OF MIDDLESEX.

Poor Rate—Distress Warrant—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 6, 47.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), does not affect or apply to proceedings for the recovery of poor rates and other rates recoverable in the same manner as poor rates; and a distress warrant in respect of such rates may be issued as before the Act.

RULE calling upon a Justice for Middlesex to shew cause why a mandamus should not issue commanding him to grant a distress warrant upon the goods of H. Wright, J. Hawkes, and L. Green, in respect of poor rates for the parish of Islington.

It appeared that the proceedings for the recovery of poor rates in Islington were regulated by a local Act, 20 & 21 Vict. c. cxviii., which, by sect. 14, enacted that upon default in payment of rates it should be lawful for a police magistrate or justice for the county upon proof of the due service of a summons, &c., to grant a warrant of distress. In January, 1880, summonses were taken out by the vestry against the persons mentioned in the rule, who were ratepayers, for the non-payment of sums in each case exceeding 20*s.*, in respect of the parish rates. Upon application to the justice, sitting alone at a place not appointed for holding petty sessions, for a distress warrant, he refused to grant it, on the ground that since the Summary Jurisdiction Act, 1879 (1), he had no jurisdiction.

(1) By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49 [coming into operation on the 1st of January, 1880], sect. 6: "Where, under any Act whether past or future, a sum of money claimed to be due is recoverable on complaint to a Court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a Court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act and not otherwise."

By sect. 20 a Court of summary jurisdiction is in future always to sit at a petty sessional or occasional court-house, and a justice sitting alone is to have no power to order a larger sum to be paid than 20*s.*

By sect. 47: The provisions of this Act with respect to a sum adjudged to be paid by an order shall apply, so far as circumstances admit, to a sum in respect of which a Court of summary jurisdiction can issue a warrant of dis-

1880

THE QUEEN v. PRICE.

Poland, shewed cause. The question raised upon this rule is whether the Summary Jurisdiction Act, 1879, applies to proceedings for the recovery of rates. This Act was intended to apply to all civil debts recoverable before a Court of summary jurisdiction, and a rate is clearly a civil debt.

[LUSH, J. How can you bring the case within sect. 47 of the new Act unless you can shew that the Summary Jurisdiction Act, 1848, applies to warrants of distress for rates?]

The sections previous to sect. 47 of the Summary Jurisdiction Act, 1879, apply to orders for the payment of money and to convictions and fines. Section 47 was meant to apply to a different class of civil debts, which had not been dealt with by the foregoing sections.

[LUSH, J. There are cases under the Summary Jurisdiction Act, 1848, in which a warrant of distress may issue without an information or complaint. But the Act has nothing to do with poor rates; the provision for levying them is contained in 12 & 13 Vict. c. 14, which was passed in the next session.]

An application to justices for a distress warrant for rates is an application to a Court of summary jurisdiction without information or complaint. Section 47 was intended to apply to every case where justices issue a distress warrant to levy money which is due.

[COCKBURN, C.J. The section refers to a Court of summary jurisdiction. In granting a distress warrant for a rate justices act ministerially under 43 Eliz. c. 2, s. 4, and not as a Court of summary jurisdiction.]

Then sect. 6 makes the Act apply to money "recoverable on complaint to a Court of summary jurisdiction?"

[COCKBURN, C.J. Here the money is not recoverable through an order of a Court of summary jurisdiction. The rate itself is the order.]

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tress without an information or complaint under the Summary Jurisdiction Act, 1848, in like manner as if the said sum were a civil debt, and the provisions of this Act with respect to the hearing, trying, determining, and adjudging of a case by a Court of summary jurisdiction when sitting in open court shall apply to the hearing, trying, determining, and adjudging by a Court of summary jurisdiction of an application for the issue of any such warrant.

1880

THE QUEEN v. PRICE.

Lush-Wilson, in support of the rule, was not heard.

PER CURIAM (Cockburn, C.J., Lush and Bowen, JJ.). The rule must be absolute. The Summary Jurisdiction Act, 1879, has no application.

Rule absolute (to be drawn up as a rule under 11 & 12 Vict. c. 43).

Solicitor for prosecution: *J. Layton.*
Solicitor for defendants: *W. T. Ricketts.*

March 22.

[IN THE COURT OF APPEAL.]

HAWKESLEY *v.* BRADSHAW.

Pleading—Payment into Court—Several Defences—Embarrassing Defence—Rules of Supreme Court, Order XXX., rule 1; *Order XXVII., rule* 1—6 & 7 *Vict. c.* 96, *s.* 2.

19 Ch D 316

The defendant, in an action for libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of the innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper, under 6 & 7 Vict. c. 96, and also a payment of 40s. into court.

Held, overruling the judgment of the Queen's Bench Division, that the offering of an apology, and payment into court, and of a justification, could be pleaded together.

APPEAL from the judgment of the Queen's Bench Division in favour of the plaintiff. (1)

Cave, Q.C., and *J. Dunn,* for the plaintiff.

W. Graham, for the defendant.

The following cases were cited: *Berdan* v. *Greenwood* (2), *Spur* v. *Hall* (3), *O'Brien* v. *Clement* (4), *Golding* v. *Wharton Saltworks Co.* (5), *Watson* v. *Rodwell.* (6)

BRAMWELL, L.J. I am of opinion that the appeal must be allowed. I think the case is concluded by authority: *Berdan* v.

(1) Ante, p. 22.
(2) 3 Ex. D. 251.
(3) 2 Q. B. D. 615.
(4) 15 M. & W. 435.
(5) 1 Q. B. D. 374.
(6) 3 Ch. D. 380.

Greenwood (1) is in point. It is true it is there said that possibly actions to try a right and of defamation, or on which the defence is grounded on fraud, may not fall within the general rule, but that is said as a matter of precaution, it being unnecessary in that case expressly to decide how far the rule extended; but I am of opinion that the rule is of general application and applies to actions for libel. I entirely agree with that case and the reasoning on which it is founded, and it is perhaps unnecessary to say more than this in support of the argument that a plea of payment into court can be pleaded with a plea of justification in an action for libel. But I may add as to the contention whether the case comes within Order XXVII., rule 1, that I see no ground for supposing it does come within that order. That order does not mean if a man avails himself of his right to plead several defences, the pleadings should be struck out, the context shews it applies to those pleadings which are scandalous or which tend to prejudice embarrass or delay the fair trial of the action, these may be struck out. Here the plaintiff is not prejudiced or embarrassed: he is embarrassed only in the sense that he would be if the Statute of Limitations were pleaded; but he would in that case have very little chance of getting it set aside. Such a statement of defence might embarrass him in conducting his case, if he has no cause of action, but not in dealing with his adversary's case if that is frivolous. A man brings an action against another, and says by reason of your negligence my horse was killed, the defendant says he is not guilty of that negligence, but 10*l.* is sufficient satisfaction; why should he not plead those defences together? Now take the case for an action for libel; the defendant says he did not publish the libel, but rather than contest an action he pays 5*l.* into court, why should he not do so? Take another case where the defendant says it is no libel, but rather than contest that question I will pay 5*l.* into court. Then take another case, where the defendant says the libel is true; why should he not in that case be allowed to pay 5*l.* into court rather than contest it? Mr. Hawkesley ought either to treat the 40*s.* paid into court in this case with contempt and go down to trial, where his counsel would urge that the money paid into court was inadequate

(1) 3 Ex. D. 251.

1880

HAWKESLEY v. BRADSHAW.

and his client was entitled to greater damages, or if the 40*s.* compensation is really enough, he never ought to have brought the action. But it is said, suppose the case of an action brought by a plaintiff to clear his character, the defendant pays 40*s.* into court, the plaintiff does not want damages, what is he to do? I think his course is to take the cause down to trial, and his counsel would say that the plaintiff has not brought the action for the purpose of recovering damages, but for the vindication of his character, and that if the defendant apologizes and pays another 40*s.* in addition to that paid into court, the plaintiff will be satisfied. In such a case no difficulty arises except from the fact that the plaintiff has not got a good case. I think the defendant is the person who is embarrassed. Suppose he does not know whether the alleged libel is a libel or not, and he pays 40*s.* into Court, at the same time pleading that it is no libel, and a justification, is he to have his defence struck out by a judge at chambers? I can understand a possibility of a difficulty arising where a man asserts that he has a right of way, and brings an action to try that right; even then if the defendant pays money into court with a denial of the right of way, the plaintiff's course is to go down to trial. It seems to me to be only reasonable that if a defendant pays money into court he should not be precluded from setting up any other defence he may have to an action brought against him.

BAGGALLAY, L.J. I have fully considered the case of *Berdan* v. *Greenwood.* (1) I am satisfied that it was rightly decided. It has been further argued that, as the master at chambers and the Divisional Court have exercised their discretion in striking out the defence as embarrassing, this Court ought not to interfere with that discretion; and in support of this contention *Golding* v. *Wharton Saltworks Co.* (2), and *Watson* v. *Rodwell* (3) have been cited. In those cases no doubt the Court refused to interfere with the exercise of a mere discretion, but the present case was determined upon principle, the Court deciding as matter of law that these defences ought not to be pleaded together.

(1) 3 Ex. D. 251. (2) 1 Q. B. D. 374.
(3) 3 Ch. D. 380.

THESIGER, L.J. The judgment of this Court in *Berdan* v. *Greenwood* (1) laid down a general rule; by that rule we are bound. The only question is, whether this particular case constitutes an exception to it. The Court below did not decide this case on the ground that by reason of the special circumstances this pleading was embarrassing, but on the ground that the case was one of a class which is taken out of the rule laid down in *Berdan* v. *Greenwood*. (1) I need not repeat what was there said. It is sufficient for me here to say that the rule is founded upon the principle than when a man is threatened with an action, if he thinks proper to stop that action by a payment of money, he should be entitled to do so, and should not be prevented at the same time from saying that the plaintiff has no cause of action. Is the position of a plaintiff in an action of libel so peculiar that the Court ought in his favour to make an exception? Take the case of an action for libel in which the defendant pleads a payment into court with a denial of the libel only, and the case where in a similar action the defendant pleads the payment into court with a justification of the libel. How is the plaintiff in either case embarrassed by this mode of pleading? In the first case the defendant says, "I did not libel you, but if I did I made you amends and you can take the money out of court." There is no repetition of the libel; the plaintiff can take out the money without admitting that there is any imputation on his character. If the money paid into court is enough, why should he not take the money out of court and stop the action? If the money paid into court is not enough to satisfy the damages the plaintiff has sustained, what embarrassment is there? He can join issue and try the question of libel, and also whether he has sustained greater damage than is compensated by the sum paid into court. Now take the other case, of payment into court with a justification pleaded. In that case one state of circumstances can be imagined —a justification of libel, which involves a serious imputation upon the plaintiff, accompanied by a payment of money into court. In such a case the plaintiff can safely go down to trial and trust to juries and judges to protect him, either in the way of damages or of costs in the event of the justification failing. Supposing on

(1) 3 Ex. D. 251.

1880

HAWKESLEY v. BRADSHAW.

the other hand the case to be one of alleged libel, nearly on the border line of libel and no libel,—it may be said that it is not desirable that such an action should be brought,—but if brought, what difficulty has the plaintiff in acting? If the payment is enough to satisfy the damages, the case is one in which the plaintiff can reasonably take the money out of court; if insufficient, the plaintiff takes the case down to trial, and must then try whether it is a libel and whether the justification can be disproved as well as the sufficiency of the sum paid. But it is further said that the payment into court is made under Lord Campbell's Act, and that the course pursued by the defendant is therefore improper. I cannot accede to that view. Looking at the whole statement of defence, the defendant appears to have claimed the benefit of Lord Campbell's Act as well as of the Judicature Acts; but assume that the payment were made under Lord Campbell's Act alone, how is the matter altered? In addition to pleas at Common Law, pleas under this Act were given to proprietors of newspapers. Before the Judicature Acts they could not be pleaded with other pleas, but since those enactments either a plea under Lord Campbell's Act can, like pleas generally, be pleaded with other defences, or it is a payment coming under Order XXX., and therefore falling within the rule in *Berdan* v. *Greenwood.* (1)

Judgment reversed.

Solicitors for plaintiff: *Wansey & Bowen.*
Solicitors for defendant: *Taylor, Hoare, & Taylor.*

(1) 3 Ex. D. 251.

[CROWN CASE RESERVED.]

1880
Feb. 28.

THE QUEEN *v.* CRAMP.

Abortion, attempt to Procure—Noxious Thing—24 & 25 *Vict. c.* 100, *s.* 58.

The prisoner was convicted, under 24 & 25 Vict. c. 100, s. 58, of having feloniously and unlawfully caused to be taken by E. V. a certain "noxious thing," to wit, half an ounce of oil of juniper, with intent to procure the miscarriage of the said E. V.

It was proved that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without any bad effect, but that a half ounce produces ill effects, and is to a pregnant woman dangerous.

The question reserved was whether there was evidence that the half ounce of oil of juniper was a "noxious thing" within the statute.

Held, by the Court (Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Stephen, JJ.), that there was evidence that it was a "noxious thing" within the statute, and that the conviction was right.

THE prisoner was convicted before Denman, J., at Maidstone, on an indictment which alleged that he "feloniously did unlawfully cause to be taken by one Ellen Elizabeth Verrall a certain noxious thing, to wit, a large quantity, to wit, half an ounce of oil of juniper, with intent feloniously to procure the miscarriage of the said Ellen Elizabeth Verrall against the form of the statute," &c.

The statute referred to was 24 & 25 Vict. c. 100, s. 58.

It was proved that the prisoner did, with intent to procure the miscarriage of Verrall who was with child by him, give her an ounce bottle full of oil of juniper, and tell her that she must take it, half of it at a time in two doses, and she accordingly on the following morning took half the contents of the bottle, which caused violent sickness, of which she informed the prisoner, who told her not to mention that he had given it or he might be transported, and said that she would not now have a child.

She did not in fact miscarry, but was with child at the time of the trial.

There was evidence that the bottle given by the prisoner contained 500 to 600 drops of oil of juniper, that oil of juniper in small quantities of from 5 to 20 drops is commonly used without any bad effects as a diuretic and otherwise, but that taken in a

1880

THE QUEEN v. CRAMP.

dose of half an ounce it acts as a powerful stimulant and irritant, and produces violent purging and vomiting which would have a tendency to procure miscarriage, by reason of the shock to the system, and the straining of the parts, consequent upon the purging or vomiting, and that a dose of half an ounce of oil of juniper would be a very dangerous dose to administer to a pregnant woman; but the danger would consist in the high probability of its causing miscarriage, which is always more or less dangerous to a woman, and not in the probability of any mischief of any other kind.

It was contended for the prisoner that there was no evidence of the prisoner having caused "a noxious thing" within the meaning of the statute to be taken, as the evidence only shewed that oil of juniper would be noxious when taken in excess.

The learned judge told the jury that if they were satisfied that the prisoner had given the prosecutrix the full ounce bottle of oil of juniper, and told her to take half, with the intent of causing her to miscarry, and if they thought that such a dose of oil of juniper was a noxious thing, as being calculated to injure the health of the prosecutrix by causing her to miscarry, they might find him guilty, which they did.

No case was cited at the trial upon the question, but the counsel for the prisoner having subsequently called the attention of the learned judge to the case of *Reg.* v. *Hennah* (1), he stated the above case for the consideration of this Court, directing attention to the case of *Reg.* v. *Isaacs.* (2) The question reserved was whether there was evidence that the half ounce of oil of juniper taken by the prosecutrix was a "noxious thing" within the meaning of s. 58 of 24 & 25 Vict. c. 100. If so, the conviction was to stand. If otherwise, to be quashed.

Douglas Kingsford (*F. Mead,* with him), for the prisoner. The contention on behalf of the prisoner is that the expression "noxious thing" means something ejusdem generis with poison, and that this is apparent from the context, the offence being the administration "of poison or other noxious thing."

[LORD COLERIDGE, C.J. A poison is not necessarily noxious

(1) 13 Cox, C. C. 547. (2) 32 L. J. (M.C.) 52; L. & C. 220.

1880

THE QUEEN v. CRAMP.

in all cases, it may be harmless if administered in minute quantities.

STEPHEN, J. A thing may become noxious simply by being administered in excess.]

The statute does not make it an offence to administer, with the forbidden intent, harmless substances even in excessive doses. The offence is administering a thing in itself noxious.

The following cases were cited: *Reg.* v. *Hennah* (1); *Reg.* v. *Isaacs* (2); *Reg.* v. *Perry.* (3)

A. B. Kelly, for the prosecution, was not called upon.

LORD COLERIDGE, C.J. The conviction is one that should be affirmed. The intent with which the oil of juniper was given was proved, and it was further proved that it was noxious in the quantity administered. What is a poison? That which when administered is injurious to health or life, such is the definition of the word poison. Some things administered in small quantities are useful, which, when administered in large quantities, are noxious. In the present case the oil of juniper as administered was noxious. The case is within the statute.

In the case of *Reg.* v. *Isaacs* (2) the drug was not shewn to be capable of doing harm. In that of *Reg.* v. *Perry* (3) the quantity was so small as to be innocuous, and that was also the case in *Reg.* v. *Hennah* (1), the thing there taken was not noxious in the form taken.

DENMAN, J. I am of the same opinion. Where a person administers with the improper and forbidden intent large quantities of a thing which so administered is noxious, though when administered in small quantities it is innocuous, the case falls within the statute. I entertained no doubt upon the point myself.

POLLOCK, B., concurred.

FIELD, J. The statute speaks first, of poisons, secondly, of other things. If the thing administered is a recognised poison the

(1) 13 Cox, C. C. 547. (2) 32 L. J. (M.C.) 52; L. & C. 220.
(3) 2 Cox, C. C. 223.

1880

THE QUEEN v. CRAMP.

offence may be committed, though the quantity given is so small as to be incapable of doing harm. What was the thing administered in the present case? So much oil of juniper. Was this proved to be noxious? It was, consequently it was a "noxious thing."

STEPHEN, J. This case stands on the same principle as *Reg.* v. *Hennah.* (1) Everything which is noxious is a "noxious thing." With regard to the meaning of "poison," there are certain things which have acquired the name of poisons, and as to these possibly if a small quantity only were administered the administration might come within the statute.

Conviction affirmed.

Solicitors for prosecution: *Cripps & Son, Tunbridge Wells.*

Solicitors for prisoner: *De Jersey, Micklem & Son, for J. G. Langham, Uckfield.*

March 16.

[IN THE COURT OF APPEAL.]

THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* THE LONDON AND PROVINCIAL SUPPLY ASSOCIATION, LIMITED.

Pharmacy Act, 1868 (31 *&* 32 *Vict. c.* 121), *ss.* 1, 15—*Corporation acting as Chemist and Druggist—Liability to Penalties—"Person."*

In ss. 1, 15 of the Pharmacy Act, 1868—which prohibit under a penalty any person, not being a duly registered pharmaceutical chemist, from keeping open shop for the sale of poisons or using the name of chemist or druggist—the word "person" does not include a corporation, and the penalty cannot be recovered from an incorporated company for keeping a chemist's shop as described in the Act.

Judgment of the Queen's Bench Division (4 Q. B. D. 313) reversed.

Affirmed by H. of L. 5 Q.B.D. 188 & 857 H.L.

APPEAL of the defendants from the judgment of Cockburn, C.J., and Mellor, J., overruling a decision of the judge of the county court of Bloomsbury, in an action for a penalty under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121.)

The facts of the case are fully set forth in the judgment delivered by Cockburn, C.J. (2); and it is here necessary to make only the following short statement of them.

(1) 13 Cox, C. C. 547. (2) 4 Q. B. D. 313, at p. 315.

The defendants were a limited company, registered under the Companies Act, 1862, 1867. Amongst other kinds of business carried on by them, they kept an open shop for retailing, dispensing, and compounding poisons, within the meaning of the Pharmacy Act, 1868. The shop was under the management of a shareholder and two assistants: these three were duly qualified under that statute, but the managing director was not so qualified.

Feb. 23. *A. Wills, Q.C.*, and *Finlay*, for the defendants. The defendants are not liable to be sued for the penalty imposed by the Pharmacy Act, 1868, s. 15; they are registered under the Companies Acts, 1862, 1867, and are a body corporate; therefore they are not a "person" within the meaning of the Pharmacy Act, 1868, ss. 1, 15.

First, it is contended for the defendants that in modern legislation wherever it is intended to apply the provisions of a statute to corporations, either they are included in the enacting clauses by express terms, or a section is inserted declaring that they shall be comprehended in some word used in the statute. It is true that the word "person" may of itself include a corporation, but at the present day this construction is not to be adopted without good reason. As an indication of the intention of the legislature it may be mentioned that in the Act for shortening the language used in Acts of Parliament (13 & 14 Vict. c. 21, s. 4) it is not provided that "person" shall include a corporation. 7 & 8 Geo. 4, c. 28, s. 14, which declares that statutes as to criminal matters shall extend to corporations, is not in point for the present case which is a civil proceeding; but it shews that in the opinion of the legislature express enactment is as a rule necessary to bring corporations within the provisions of a statute. A similar view of the law was adopted by Lord Coleridge, C.J., in *Guardians of St. Leonard's, Shoreditch* v. *Franklin*. (1) It was held in *Harrison's Case* (2) that the word "person" in a statute as to forgery did not extend to corporations: this is a decision which goes very far in favour of the defendants, for corporations were clearly within the mischief which it was intended to remedy. In many statutes passed in 1868, and also

(1) 3 C. P. D. 377. (2) 1 Leach C. C. 180.

1880

PHARMACEUTICAL SOCIETY v. LONDON SUPPLY ASSOCIATION.

before and after that year, an interpretation clause has been inserted declaring that the word "person" shall include a "corporation." The plaintiffs may rely upon 2 Ins. 722; but the passage alleged to be in point is not a decision, it is a mere dictum as to the construction of a particular statute.

Secondly, it is submitted that upon a review of the provisions of the Pharmacy Act, 1868, it is clear that the word "person," as used therein, cannot apply to corporations; and in order to ascertain the meaning of the language used in a statute, it is always advisable to look at the context: *Walker* v. *Richardson.* (1) Some of the sections of the Pharmacy Act, 1868, relate to examination, registration, and death of persons; these are obviously inapplicable to corporations.

Thirdly, even if the statute comprehends corporations, the defendants are protected, inasmuch as those who managed the shop were duly qualified: *Raynard* v. *Chase.* (2)

Feb. 25. *Sir J. Holker, A.G.*, and *Lumley Smith*, for the plaintiffs. In a statute the word "person," primâ facie, includes a corporation, and the intention of the legislature in passing the Pharmacy Act, 1868, would be defeated, if that word were held to be restricted to individuals. The object of the statute was to regulate the sale of poisons, and the mischief intended to be remedied was the facility with which poisons might be obtained; it was wished to fix upon some one who should be responsible for carrying on the business of a druggist in a proper manner; but if the construction contended for by the defendants be correct, they may sell poisons in large quantities without incurring any penalty. There is no reason in law why a corporation should not be liable to a penalty in an action: it may be sued for a tort: *Yarborough* v. *Bank of England* (3); and it may be indicted for a misfeasance, such as creating a nuisance. If the procedure for recovering the penalty had been by information before justices, the defendants would have been liable by force of 7 & 8 Geo. 4, c. 28, s. 14, and it will be a singular result if the defendants are exempt because the legislature has directed the penalty to be recovered by an action in the county court.

(1) 2 M. & W. 882. (2) 1 Burr. 2. (3) 16 East, 6.

1880

PHARMACEUTICAL SOCIETY v. LONDON SUPPLY ASSOCIATION.

A. Wills, Q.C., in reply. At the time when the Pharmacy Act, 1868, was passed, probably it was not contemplated that corporate bodies would sell poisons; and if the legislature had no intention to include them, they ought not to be held liable to the penalties because this Court may think that they fall within the mischief aimed at by the statute.

Cur. adv. vult.

March 16. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this appeal must be allowed. I think the word "person" in s. 15 of the Pharmacy Act, 1868, does not include a corporation. That the word "person" may include "corporation," I will not deny. Though at the same time, considering the way in which statutes are now drawn, that where "corporation" is meant, it is always named,—at least there is no modern instance to the contrary,—that when the legislature made a general interpretation clause that "person" should be male and female, plural and singular, &c., it did not include corporation, I should be reluctant to hold that in any particular statute "person" included "corporation," unless there was strong reason so to do. In this case there is, in my opinion, no such reason, but the contrary. Sections 1 and 15 of the Act create an "offence," and provide for its punishment. But for s. 15, s. 1 would create a misdemeanour punishable by indictment, fine and imprisonment. But offences, certainly offences of commission, are the offences of individuals, not of corporations. A corporation cannot have the mens rea. I do not say that a corporation cannot be guilty of an offence of nonfeasance—it certainly can be: but though if the legislature pleased it might enact that a corporation should in a certain event be taken to have committed an offence, it must be taken primâ facie that in speaking of "offenders" it speaks of individuals. If a statute were to say that any person publishing a libel should be guilty of an offence, or that no person should publish a libel, a corporate printing company publishing a libel would not be guilty in its corporate capacity, but the individuals publishing would be the offenders. So, for instance, as to the sale of beer or of spirits. No doubt if there was strong reason for saying "person" in this statute meant "corporation," one ought

1880

PHARMACEUTICAL SOCIETY v. LONDON SUPPLY ASSOCIATION.

Bramwell, L.J.

so to hold: as, for example, if the mischief to be prevented could not be otherwise. That is not so here, for the individual offender may be got at. If the servant or shopman of a corporation sells poison, not being a pharmaceutical chemist and registered under the Act, it will be no answer to an action for the penalty to say that he did it as servant whether of an individual or a corporation not qualified. If the act is in itself unlawful, it is not the less so because done as servant. If it would be lawful because the servant was qualified, though his employer was not, I think the statute is shewn by this construction to be all the more reasonable, as in that case a corporation is on the same footing as a partnership, and there is no reason why it should not be. It may be asked how is the "keeping open shop" to be reached. The servants do not keep it open. No, but the directors or managers do; they are the offenders in that case. I cannot see how they could deny that they kept open the shop. They do. They do it in fact. If they committed a public nuisance by smells, vapours, or otherwise, in the preparation, or (if supposable) in the sale of their drugs, they and not the corporation would be indictable. I see no reason then for including "corporation" in the word "person." I see many the other way. It is remarkable that "person" never includes "corporation" in any other section of this statute. It is manifest that "persons" in the preamble keeping open shops, and "persons" known as chemists and druggists, mean individuals: for they are "persons" who it is expedient "should possess a competent practical knowledge." Then such "persons" are to be examined. It is manifest that "persons" there does not include corporations: why should it in s. 1? So "persons" in s. 3, who have been assistants, cannot include corporations. Nor the "person" in s. 4 who is to be of full age. Nor the "persons" in s. 5 who had been admitted pharmaceutical chemists, for no corporation had been. Nor the "person" in s. 6, for a corporation never could have a "certificate of competent skill." Nor the "person" in s. 10 who is a person that may die. In short, "person" in no other section of this Act includes "corporation." Further than this, I am by no means certain that the statute is not levelled at the individual actually acting, and not (at least in all cases), his employer. Who would be liable under s. 15 for com-

pounding medicines of the British Pharmacopœia otherwise than according to its formularies? Surely the actual person compounding. Section 16 supposes there may be a qualified assistant and not a qualified master: again s. 17, which specially provides that for certain matters the master is liable, seems to suppose that otherwise he would not be. Then s. 18 and the following where they use the word "person" clearly do not mean corporation. There is this advantage as I have said in this construction, that it does not exclude a corporation from the benefit of carrying on this business, nor the public from dealing with them. It is not needlessly in restraint of trade, as it otherwise would be, at least not directly. If it does indirectly operate to preclude a corporation carrying on the trade, however qualified all its members may be, it is to be regretted. But then there is no need for making "person" include "corporation," nor for creating the novelty of a corporate offence. It only would operate against a corporation as it would against a partnership.

Further, how is this the act of the corporation, if it is unlawful? For if it is, it is ultrà vires of the directors. An assistant hired by them to sell these poisons, if so doing is unlawful, could maintain no action against the corporation. They would have a good defence. Of course, if by their articles of association poisons are expressly to be sold, their sale would not be ultrà vires, but that does not appear in this case; and at all events the possibility is a reason for fixing the individual, and not the corporation.

In the result, considering the way in which modern statutes are drawn, that corporations are specified where corporations are meant, that offences are wilful breaches of law or inattention to its commands, and so the act of the individual offending; that there is no reason for holding corporations to be within the Act, that there are reasons to the contrary, and that in no other section of this Act does "persons" mean "corporations," I am of opinion that it does not in these sections. I am aware that the penalty is recoverable by plaint in the county court (15 & 16 Vict. c. 56); but the sum recovered is at the disposition of the Crown (s. 14), and it is a penalty, and the act an "offence," and the person an "offender." I am also aware that there is ground for saying that under s. 15 all of several partners keeping a shop must be

1880

PHARMACEUTICAL SOCIETY v. LONDON SUPPLY ASSOCIATION.

Bramwell, L.J.

qualified, though none attend, and the shopman need not be qualified. If so, it may be said so must all the shareholders and directors of a corporation. I do not know. The Act may have a more limited meaning, and be more reasonable. If not, still this furnishes no argument in favour of "person" meaning "corporation." But anyhow, this construction will effect the object of the statute; for if that is to impose the penalty on the person actually doing the prohibited act, unless himself qualified, e.g., the shopman, this opinion will not affect his liability. If the intention is to impose the penalty on the person actually doing the prohibited act, unless the master or employer or principal is qualified, this opinion will not affect that liability. If the statute means—it can have no other object except this—to impose the penalty on him who commands the prohibited act to be done, unless he is qualified, this opinion will not affect his liability. And if the penalty attaches to several, unless all are qualified, they will be liable, notwithstanding this opinion. While it will avoid this absurdity, that a corporation, though all its members, all its directors, and all its servants are qualified, could not lawfully sell, nor acquire the power lawfully to sell, the articles in question. The statute was not meant to interfere with freedom of trade. It was for the protection of the public and not of chemists; for whose benefit alone this proceeding I suspect is taken.

BAGGALLAY, L.J. I agree in opinion that this appeal should be allowed.

In modern times, when the legislature has intended that the word "person," or any other word primarily importing an individual, should in any particular statute include a corporation, it has been usual to introduce an interpretation clause, declaring that the word shall have such extended meaning; and in the year 1868, the year in which the Act now under consideration was passed, at least four other Acts were passed into which such a clause was introduced, namely, the Sea Fisheries Act (c. 45), the Curragh of Kildare Act (c. 60), the Regulation of Railways Act (c. 119), and the Artizans and Labourers Dwellings Act (c. 130); and in another, the Fairs (Ireland) Act (c. 12), the word "owners" was declared to have the same meaning. Now the

omission from Lord Brougham's Act (13 & 14 Vict. c. 21) of any general declaration that the word "person," when used in subsequent statutes, shall include a corporation, and the absence from the Act under consideration of any such interpretation clause, to my mind strongly support the view that the legislature had no intention that the word "person," where used in the Act, should include a corporation.

It probably is the fact, as was suggested in argument, that at the time when the Act passed it was not in the contemplation of the legislature that a corporate body would embark in the business of selling or of dispensing or compounding poisons, and that consequently it had no intention of either including or excluding a corporation when using the word "person." But, however this may be, it must, I think, be admitted that, although an Act may not contain a declaration that the word "person" shall include a corporation, and although it may be clear that the legislature could not reasonably be presumed to have had any intention in the matter, yet if it should be clear from the general scope and purport of the Act that the selling, dispensing, or compounding of poisons by a corporation would or might be within the mischiefs intended to be guarded against, and if the extending the meaning of the word "person" so as to include a corporation would enable the necessary protection to be given, such an interpretation may and ought to be adopted. But when I turn to the Act now under consideration, I can find nothing to lead me to such a conclusion. The object of the Act is to prevent the selling, dispensing, or compounding of poisons by unqualified persons. A corporation cannot of itself sell, dispense, or compound; it can only do so by the aid of a servant or assistant, and if that servant or assistant is duly qualified in manner required by the Act, as is admittedly the case as regards the dispensers employed by the defendants, the object of the Act is obtained. And in the view which I take of the Act, the protection intended to be given to the public is sufficiently secured in the case of a corporation keeping an open shop for the sale, dispensing, and compounding of poisons; for, in my opinion, the seller referred to in the first section is the actual seller, and not the individual or corporation on whose behalf he may act; and this view is supported by the

1880

PHARMACEUTICAL SOCIETY v. LONDON SUPPLY ASSOCIATION.

Baggallay, L.J.

language of the 17th section, which, when dealing, not with the simple selling of poisons, but with selling particular poisons without the adoption of special precautions, imposes a comparatively small penalty on the seller, but declares that for the purposes of that section the person on whose behalf the sale is made shall be deemed to be the seller, thus implying that, except for the purposes of that section, the person referred to in the Act as selling means the person actually selling, and not the person by whom he is employed.

I need not refer to the many sections of the Act which are quite inapplicable to the case of a corporation, as they have been pointed out in detail by Bramwell, L.J.

In the absence, then, of any declaration in the Act that the word "person" is to include a corporation, and not gathering from the general scope and purport of the Act that there is any necessity in the interest of the public that any such interpretation should be given to the word, I have arrived at the conclusion that such an interpretation ought not to be put upon it, and that this appeal should be allowed.

THESIGER, L.J. I also am of opinion, not without doubt, that this appeal should be allowed.

The question for determination is whether an incorporated company is subject to the prohibition contained in s. 1 and liable to pay the penalty imposed in s. 15 of the Pharmacy Act, 1868, or, in other words, whether the term "person" used in those two sections includes such a company. In dealing with this question I start with the axiom that the term "person" is in legal phraseology wide enough to include not merely natural persons, i.e., individuals, but artificial persons, such as corporations, aggregate as well as sole. I start at the same time with the undisputed fact, that the practice in modern statutes where corporations are intended to be affected is either to expressly name them, or to use in reference to them the term "person" with an interpretation clause expressly providing that corporations are intended to be included in the term. As a proper resultant of the opposition between the axiom and the practice, it appears to me that the term "person" when contained in a modern Act of Parliament

should never be construed to include corporations, except where, first, the term is expressly interpreted as including them; or, secondly, the context of the Act clearly shews that they are so included; or, thirdly, the object and scope of the Act peremptorily require them to be so included, and the context does not clearly negative a construction to that effect.

Neither the first nor the second condition exist in the particular Act under consideration, but for a long time I have doubted whether the judgment of the Court below might not be supported upon the third. The object of the Act is that of providing for the safety of the public in the matter of the sale of poisons. The means by which that object is proposed to be attained is, inter alia, that of subjecting those who keep open shop for the retailing, dispensing, or compounding of poisons to certain conditions and restrictions. Corporations may keep open shop, their doing so without proper safeguards may expose the public to the mischiefs against which the Act is intended to guard. There is, therefore, a strong presumption à priori that they would be made subject to the same conditions and restrictions as those to which individuals would be subjected, or at least to some conditions and restrictions that would serve to the same end. Proceeding a step further, it may be said that a statutory provision under which a particular thing is made unlawful for any individual to do, except under certain conditions, contains an indication that the thing itself is intended to be entirely prohibited except under those conditions, and consequently cannot be done by a corporation, even though the conditions are in their nature such as cannot under any circumstances be complied with by them. Lastly, a penalty by which the prohibition is to be enforced, recoverable by civil suit, is as applicable to corporations, who may even under certain circumstances be the subject of indictment, as it is to individuals.

Notwithstanding, however, the force of these considerations which still press themselves upon me, I have come to the conclusion that the whole context of the Act too clearly points to individuals alone being intended by the term "person" to allow of that term being held to include corporations in the 1st and 15th sections. I do not propose to repeat what has already been said by Bramwell, L.J., upon this point. He has shewn

1880

PHARMACEUTICAL SOCIETY v. LONDON SUPPLY ASSOCIATION.

Thesiger, L.J.

conclusively that the preamble and every section of the Act, putting aside for the moment the two sections whose meaning is in dispute, when using the term "person" or "persons" refer to individuals alone. But in addition to what he has pointed out, I find in the 1st section itself evidence that the words "any person" in the earlier part of that section are limited to individuals and cannot be extended to corporations, for in a subsequent part of the same section the word "person" is again used with such a context as absolutely forbids its application to a corporation, and yet in such a relation to the same word contained in the earlier part of the section as to grammatically require that it should receive the same construction. I do not think that under such circumstances the Court ought to strain the language of the Act so as to make it include corporations, even if it were clear that the mischief intended to be provided against would otherwise in the case of companies keeping open shop for the sale of poisons be remediless. But I feel bound to add that I am by no means satisfied that although a corporation as a separate entity be not liable to the penalty, which is sought to be recovered in this case, the individual members of the corporation, whether directors of company or otherwise, may not be liable, and thus the mischief be remedied. I prefer, however, to give no definite opinion upon this point, for it involves the question whether the legislature intended or not to practically put an absolute veto upon the keeping open shop for the sale of drugs by trading corporations, and the absence from the Act of any express reference to such companies is almost equally difficult to be accounted for upon the notion that the legislature had that intention, as upon the notion that the legislature did not think of the matter at all, and thereby a casus omissus has occurred.

Judgment reversed.

Solicitors for plaintiffs: *Flux & Co.*
Solicitors for defendants: *Crouch & Spencer.*

THE QUEEN *v.* GASKARTH (CHAIRMAN OF THE LOCAL BOARD OF ALTRINCHAM). 1880 *May* 3.

Local Board—Disqualification for Membership—Lease of Sewage Farm by Local Board to Member—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *sched. II., clause* 64—"*Interested in Sale or Lease of Lands.*"

A person is not disqualified for membership of a local board, under the 64th clause of the second schedule to the Public Health Act, 1875, by reason of a lease by the board to him of a sewage farm containing covenants on the part of the board to supply, and on his part to use on the premises, the sewage of the district.

APPLICATION for a writ of mandamus directed to the chairman of the local board of the district of Altrincham, commanding him, as returning officer, to certify that Mr. John Newton was duly elected to be a member of the local board at the annual election of members held in April, 1880.

It was not disputed that Mr. Newton, if not disqualified, was duly elected; but the returning officer refused to certify that he was elected on the following ground. It appeared that the local board had acquired certain land on lease for the purposes of a sewage farm, and had leased the same to Mr. Newton for a term of years at a somewhat lower rent than they paid themselves. The lease to Mr. Newton contained covenants that he would use and cultivate the said premises as a sewage farm according to the most approved method of cultivation in the neighbourhood and the rules of good husbandry, and the stipulations thereinafter contained, and would use all the sewage, to be supplied as thereinafter mentioned, upon the said premises, and would not turn into, or allow to be turned into, the brooks or watercourses on the said premises any sewage, except in case of overflow caused by storms, but would use the same entirely for fertilising the land, and that he would indemnify the board from all actions, claims, and demands in respect of any nuisance caused by any improper use of sewage, or owing to sewage matter being allowed to run into the brooks or watercourses on the said premises, except in the case of overflow, as aforesaid. The board, on their part, covenanted to deliver on the said premises all the sewage made in the district free of

1880

THE QUEEN v. GASKARTH.

expense to the said J. Newton, or such quantity thereof as the present 21-inch pipes would deliver.

The returning officer took the view that Mr. Newton was disqualified for membership of the local board by reason of the provisions of the lease, under the 64th clause of the second schedule to the Public Health Act, 1875 (38 & 39 Vict. c. 55).

A rule nisi had been obtained for a mandamus as above, on the ground, first, that it was not part of the returning officer's duty to determine as to the disqualification of candidates under the 64th clause, but merely to return as elected those who, being qualified under the 3rd, 4th, and 5th clauses of the second schedule, had the greatest number of votes. Secondly, that the lease was within the exceptions mentioned in the 64th clause of the second schedule to the Public Health Act.

Lumley Smith, Q.C., and *C. A. Russell*, shewed cause. The 1st to the 5th clauses of schedule 2 of the Public Health Act relate to the qualification of members for election. The 64th clause relates to disqualifications.

[FIELD, J. The 64th clause relates to disqualification of members, and provides that in certain events the member shall cease to be a member. The provisions as to the qualifications for becoming a member are contained in a different set of clauses, viz., clauses 1 to 5, of the 2nd schedule. Possibly a person, on being elected, might choose to throw up any contract that would disqualify him from holding office.]

He could not do so without the consent of the board. Whether it was, strictly speaking, within the functions of the returning officer to deal with this question or not, the Court would not grant the mandamus if it could see that it would be idle to do so, because the candidate could not hold the office if returned: *In re Bristol and North Somerset Ry. Co.* (1); *Reg.* v. *Saddlers' Company.* (2) It is contended that a person who is disqualified cannot be qualified to be elected, and the 52nd clause expressly provides that the candidates to the number to be elected, who, being duly qualified, have obtained the greatest number of votes, shall be certified by the returning officer to be elected.

(1) 3 Q. B. D. 10.

(2) 3 E. & E. 42, 84.

This lease is not within the exceptions mentioned in the 64th clause. The words of the exception are, "interested in the sale or lease of any lands or in any loan of money to the local board." It is submitted that the words "to the local board," apply to the whole sentence. Sales and leases of land by the local board are, therefore, not within the exception. If a lease of lands by the board would be within the exception, in this case there is more than a lease of lands—there is a covenant quite distinct and severable from the lease for the supply of sewage. This is within the mischief intended to be guarded against.

R. S. Wright, supported the rule. It is contended that the clauses with regard to qualification and disqualification are quite distinct. The latter only prevent a person from holding office when disqualified, and not from being elected. The candidate may elect to throw up the disqualifying contract.

Secondly, the words "to the local board," in clause 64, only refer to the immediately preceding words, viz., "any loan of money."

By ss. 27 and 29, express provisions are made for leases of land by or to the board for sewage purposes, and there is no reason why there should be a distinction in this respect between leases by and leases to the board. This is substantially a lease within the exception, the contract for the supply of sewage being merely ancillary to the lease for agricultural purposes. It is clear, having regard to the provisions of the 29th section, that this is so.

LUSH, J. I am of opinion that, if this case were within the enacting portion of the 64th clause, we ought not, in the exercise of our discretion, to grant the writ of mandamus. It would be absurd to make the returning officer certify the return of a person who could not act as a member of the board. But I have come to the conclusion that the case is not within the enacting part of the 64th clause, and is within the proviso. We must go back, I think, to the 27th and 29th sections of the Act to ascertain the meaning of the proviso. The 27th section enacts that, "for the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, any local authority may (1.) contract for the use of, purchase, or take on lease, any land, &c., and (2.) contract to supply, for any period not exceeding twenty-five years, any person

1880

THE QUEEN v. GASKARTH.

with sewage." The 29th section enacts that any local authority may deal with any lands held by them for the before-mentioned purposes, either by leasing the same for a period not exceeding twenty-one years for agricultural purposes, or by contracting with some person to take the whole or a part of the produce of such land, or by farming such land and disposing of the produce thereof, subject to this restriction, that in dealing with the land provision shall be made for effectually disposing of all the sewage brought to such land, without creating a nuisance. These provisions, I think, at once suggest the meaning of the proviso to the 64th clause. The words are, "provided that no member shall vacate his office by reason of his being interested in the sale or lease of any lands or in any loan of money to the local board." I think the first branch of the exception ends with the word "lands," and I think the words are intended to cover a lease of a farm for agricultural and sewage purposes, whether made by or to the local board. This lease seems to me to be precisely within the provisions of s. 29 of the Act. It is a lease of land for agricultural purposes, and as such appears to me to be within the terms of the proviso to the 64th clause of the 2nd schedule. For these reasons, I am of opinion the rule should be made absolute.

FIELD, J. I have come to the same conclusion. I think it would be idle to grant the mandamus if the candidate were disqualified, but I think he is not disqualified. The disqualification was alleged to rest on the 64th clause of the 2nd schedule. Assuming that this lease would, but for the proviso, come within the words of the clause, I think it was correctly argued that it came within the proviso. I do not read the words "to the local board" as intended to apply to the whole of what goes before. The words "sale or lease of land" can, of course, only apply to sales and leases with which the local authority are concerned, but, subject to that restriction necessarily suggested by the subject-matter, the words are general, and would include sales and leases by the local authority. It is said that, even so, this is not a lease within the exception. Why not? The Act provides certain means for the exercise by the board of one of their most important duties, viz., the disposal of their sewage. They may dispose of it by taking

1880

THE QUEEN v. GASKARTH.

a lease of land for the purpose, and carrying on the business of sewage farmers on such land. If they do not find this profitable they may lease the land to some one else for agricultural purposes. They are bound, however, to get rid of all the sewage brought on the land so as not to cause a nuisance. This they do in this case by the stipulation that the lessee shall use the sewage. Why is such a lease not within the proviso? It appears to me that it is. A lease by which a landlord agrees to carry sewage to the premises by pipes, or enters into any other covenant of a similar nature with regard to the demised premises, is none the less a lease because of such a stipulation. Many agricultural leases contain some such covenants. For these reasons I agree that the rule should be made absolute.

Rule absolute.

Solicitor for applicant: *Edwin Andrew.*
Solicitors for returning officer: *Nicholls, Hinde, & Co.*

NISSLER AND ANOTHER *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE CORPORATION OF HULL.

Feb. 24.

Contagious Diseases (Animals) Act (32 & 33 *Vict. c.* 70), *ss.* 65, 66, 67, 68, 69—*Foreign Animals slaughtered at Sea—Right to Compensation—Local Authority—Jurisdiction.*

Under the Contagious Diseases (Animals) Act, 32 & 33 Vict. c. 70, no compensation is payable by local authorities in respect of foreign animals slaughtered after their arrival, but before being landed at a British port; for compensation is only payable where animals have been slaughtered in pursuance of the Act, and the Act does not authorize local authorities to order such animals to be slaughtered.

CASE stated in an action, brought by the plaintiffs against the defendants as being the local authority of the borough of Kingston-upon-Hull within the meaning of the Contagious Diseases (Animals) Act, 1869, to recover compensation for the slaughtering of certain animals belonging to the plaintiffs.

1. The plaintiffs are cattle merchants residing at Lincoln, and the defendants were at the time of the happening of the matters hereinafter mentioned the local authority of the borough of

1880

NISSLER v. CORPORATION OF HULL.

Kingston-upon-Hull under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 9, and 2nd schedule to Act.

2. On the 16th of July, 1872, the screw steamship *Joseph Somes* of Hull, belonging to Messrs. Brown, Atkinson, & Co., sailed from Cronstadt bound for Hull, having on board amongst other things fifty-eight head of oxen, the property of the plaintiffs.

The oxen appeared at the time of shipment and of the sailing of the steamship to be in good health and sound condition.

3. On the 19th of July, 1872, an Order in Council was made under the Contagious Diseases (Animals) Act, 1869, s. 16, providing that cattle brought from any place in the dominions of the Emperor of Russia should not be landed at any port or place in Great Britain.

4. On the 20th of July, 1872, the making of the order and its provisions came to the knowledge of the plaintiffs' agent at Hull, whereupon he at once telegraphed one of the plaintiffs, Wilhelm Nissler, who was at Cronstadt at the time arranging for the shipment of cattle to England, telling him that an Order in Council had been made on the previous day prohibiting importation of cattle from Russia, and to stop all shipments. The plaintiff Johann Adam Nissler also telegraphed Wilhelm Nissler to the same effect from Lincoln on the same day.

5. The *Joseph Somes* having, as hereinbefore stated, left Cronstadt on the 16th of July, it was impossible to stop her at any intermediate port. The shipment of all further cattle by the plaintiffs was, however, immediately stopped, and in one instance a steam-tug was sent in pursuit of a steamer which had already left with cattle on board, and the cattle were taken out.

6. The plaintiffs' agent at Hull, on learning from the plaintiffs that the *Joseph Somes* had left so long before his telegram arrived, and that there was no means of stopping her, at once communicated with the collector of customs at Hull, asking for instructions, and requesting permission to land the cattle from the *Joseph Somes* immediately upon her arrival, taking all possible precautions to guard against infection, and undertaking to slaughter all the cattle immediately upon their landing, and that within an enclosed area. No communication was made to the defendants,

unless the aforesaid notice to the collector is to be taken as notice to them.

7. The plaintiffs' agent also communicated with Dr. Shorten, who was the inspector and veterinary surgeon appointed by the Privy Council under the provisions of the Contagious Diseases (Animals) Act, 1869, to take charge of the inspection and passing of foreign cattle, who in turn communicated with the Board of Trade and the Privy Council, and received instructions to examine the cattle upon their arrival and report thereon. Dr. Shorten was stationed at the port of Hull, and at the time when the occurrence in this case took place the Privy Council had also a general veterinary inspector for the department, Professor G. T. Brown. Both these officers were appointed and paid by the Privy Council, and were in no way (except so far as they are so made under the provisions of the Act or Orders) connected with or responsible to the defendants.

8. On the 25th of July the *Joseph Somes* arrived at Hull with fifty-six cattle on board, having experienced very bad weather, during which the other two cattle had died from the effects of the voyage.

9. Upon the arrival of the *Joseph Somes*, such order of the Privy Council of the 19th of July, 1872, being in force, the cattle could not be landed, and the plaintiffs' agent again applied to the veterinary department of the Board of Trade, and to Dr. Shorten, for leave to land the cattle. Dr. Shorten, upon receiving the plaintiffs' application, went on board the *Joseph Somes* and examined the cattle, and came to the conclusion that some of them were affected with cattle plague, and reported to the Privy Council that two of them were affected with disease suspected to be the cattle plague. The vessel was left in charge of the Customs officer. Dr. Shorten telegraphed to the Privy Council in London for instructions, and received a reply to the effect that Professors Brown and Symonds (inspectors appointed by the Privy Council under the Act) would come from London to Hull the same night in order to inspect the cattle. The general inspector, Professor Brown, being absent from London at the time, was telegraphed by the Privy Council officers to proceed to Hull, and Professor Symonds (the principal of the Royal

1880

NISSLER v. CORPORATION OF HULL.

Veterinary College) was, at the instance of the Privy Council, sent to Hull. These two gentlemen arrived in Hull within a few hours of each other, and met on the 25th of July.

10. All the beasts were therefore kept on board the *Joseph Somes* until the morning of the 26th, when it was found that others of the cattle were then diseased. On the morning of the 26th Professors Brown and Symonds, with the Privy Council inspector at the port, examined the cattle and pronounced twenty-two of them to be infected, and said that under the circumstances it was necessary that the whole number must be slaughtered and the carcases destroyed. No certificate as to the existence of the disease as required by s. 33 was however given in this case.

11. On the morning of the 27th of July, 1872, Professors Brown and Symonds sent for James Freeman (the inspector for the defendants appointed under s. 12 of the Act), and gave him directions that the cattle should be slaughtered and their carcases placed in lighters and towed out to sea, and that the lighters should be there scuttled and sunk. Freeman wrote to Messrs. W. Brown & Co. of Hull requesting them to provide lighters to receive the carcases of fifty-six beasts on board the *Joseph Somes* brought from Cronstadt, and convey them to sea beyond three miles of the shore of Great Britain, and there sink the lighters and carcases together, and to charge all expenses to the Hull local authorities.

12. The cattle were accordingly killed, their carcases placed on board the lighters and towed out to sea, where the lighters were scuttled and sunk.

The plaintiffs claimed 1037*l.* compensation, 25*l.* as half the value of two beasts actually infected under the 68th section (1),

(1) By the Contagious Diseases (Animals) Act (32 & 33 Vict. c. 70, pt. v.) s. 65, every local authority shall cause all animals affected with cattle plague within their district to be slaughtered. By s. 66, a local authority may, if they think fit, cause to be slaughtered any animal that has been in the same shed or stable, or in the same herd or flock, or in contact with any animal affected with cattle plague within their district. By s. 67, where an animal is affected with disease suspected to be cattle plague, the local authority may cause the animal to be slaughtered in order to ascertain the nature of the disease. By s. 68, where an animal affected with cattle plague, or affected with disease suspected to be cattle plague, is slaughtered in pursuance of this Act, the local authority (except as otherwise provided in the

and 1092*l.* being three-fourths the value of fifty-four beasts under the 69th section.

The question for the opinion of the Court was whether, under the circumstances above stated, the plaintiffs were entitled to recover any and what compensation from the defendants in respect of the animals so slaughtered.

Beasley (*J. H. Johnstone*, with him), for the plaintiffs.
Cave, Q.C. (*A. P. Stone*, with him), for the defendants.
Beasley, in reply.

LUSH, J. I am of opinion that there is no liability on the part of the corporation to pay the compensation claimed by the plaintiffs. The liability, if any, must be found in one or other of the sections in Part v. of the Contagious Diseases Animals Act (32 & 33 Vict. c. 70). These sections are as follows:—[The learned judge read them at length.] Sect. 68 does not say that the compensation payable by the local authority is to be payable where the animal has been slaughtered by the order of the local authority but I think this is clearly implied. The section regulates the mode of awarding compensation for what has been done under ss. 65 and 67. Then comes s. 69: "Where a local authority causes an animal to be slaughtered on account of its having been in the same shed, or stable, or in the same herd or flock, or in contact with an animal affected with cattle plague, the owner of the animal so slaughtered may either dispose of the carcase on his

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Act) shall, by way of compensation for the animal, pay to the owner thereof such sum not exceeding 20*l.*, and not exceeding one-half the value of the animal immediately before it was affected with cattle plague, as to the local authority seems fit; and by s. 69, where the animal is slaughtered on account of its having been herded with diseased animals, the compensation payable is to be such sum not exceeding 30*l.*, as may equal three-fourths of the value of the animal.

By s. 75, the Privy Council may, from time to time, make such orders as they think expedient—for the purpose of in any manner preventing the introduction or spreading of contagious or infectious disease among animals in Great Britain—and may, in such order, direct or authorize the slaughtering of animals that are affected with any contagious or infectious disease, or that have been in contact with animals so affected, and may in any such order direct or authorize the local authority to pay compensation for any animals so slaughtered.

1880

NISSLER v. CORPORATION OF HULL.

own account, with a licence from some officer appointed in that behalf by the local authority, or may require the local authority to dispose of the same, in which latter case the local authority shall pay to the owner thereof, by way of compensation, such sum not exceeding 30*l.*, as may equal three-fourths of the value of the animal slaughtered." So that there is a short code giving authority to the local body under certain conditions to cause animals to be slaughtered, and requiring them to make compensation to a given extent for the value of the animal slaughtered. I should say if there were no other clause in the Act that primâ facie it could not be taken to apply to the animals now in question, because these animals never were landed, but were brought from Russia, stopped while afloat, and ordered to be slaughtered, and were never landed within the district of the local authority at all.

When we refer to the other part of the Act which applies to foreign animals, this seems abundantly clear. With respect to animals which have not been landed, the Privy Council have, by s. 17, power to apply the regulations in the 4th schedule of the Act, as to the landing of animals coming from abroad. Large powers over these animals are given by these regulations to the the Commissioners of Customs, and the Privy Council have power to send down their officer with instructions to deal with them. It is true the Privy Council have power to make orders for compensation for such animals as are slaughtered under their authority. Under the 75th section they have power to make any order whatsoever, which they think it expedient to make for the purpose of preventing the introduction or spread of contagious or infectious disease among animals in Great Britain, and may in any such order direct or authorize the slaughtering of animals that are affected with contagious or infectious disease, or that have been in contact with any animals so affected; and may in any such order direct or authorize the local authority to pay compensation for any animals so slaughtered. Now, these animals were slaughtered by the direction of a gentleman sent down from the Privy Council to inspect and examine these animals. It is not for us so say whether they had authority or not to order this to be done. It is quite clear—it is admitted that the Privy Council had made no order authorizing or directing the

local authorities to pay compensation for any animal slaughtered. Under these circumstances, therefore, no compensation can be payable by the corporation under that clause.

The only remaining question is whether these animals were slaughtered by the authority of the local authority, the corporation of Hull. In the first place I do not think the corporation had any authority to order them to be slaughtered. If having no authority they had in fact ordered them to be slaughtered, another question might have arisen. But I see no evidence of any such order; all that the corporate officers knew was that Mr. Freeman, their inspector, was instructed by the Privy Council to execute the orders of the Council as to the slaughtering of the cattle. The first notice of the cattle being infected was given to the officer of the customs, and he has no connection with the corporate body. Therefore the inspector was the only person connected with the body corporate who had anything to do with the slaughtering of these animals. I think it clear that he of himself had no authority to order the cattle to be slaughtered; his duty is confined to inspecting, examining, and reporting, and the corporation are enabled by the section to which I have referred to act without the delay which would be necessary in order to call the whole of the council together, because they are not only authorized but compelled to form committees, and delegate their functions to their committees, who may again delegate them for ought I know to some individual. It is clear, therefore, that the case is not within the compensation sections and the plaintiffs cannot recover.

MANISTY, J. I am of the same opinion. There is nothing from which we can imply that Freeman had any authority on the part of the corporation to order these animals to be slaughtered. It seems that the inspector is an officer appointed only for the purpose of inspecting and reporting, and the 66th section of the Act clearly shews that the authorities are themselves to exercise a discretion with regard to animals which are not affected with cattle plague, but have been in contact with animals affected with it. The language is express, "the local authorities may if they think fit." The only order and direction given here was that of

1880

NISSLER v. CORPORATION OF HULL.

Freeman acting under the authority and by the direction of the inspector of the Privy Council. But if these animals were slaughtered by the direction of an officer appointed by the Privy Council, then we find that there is no order by the Privy Council for any compensation. Therefore our judgment must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Rollit & Sons, for Rollit & Sons, Hull.*

Solicitors for defendants: *Collyer-Bristow, Withers, & Russell, for C. S. Todd, Hull.*

March 2.

[IN THE COURT OF APPEAL.]

THE PRISON COMMISSIONERS *v.* THE CORPORATION OF LIVERPOOL.

Reformatory School—Admission of Prisoner—Expense of providing requisite Clothing—Prison Act, 1865 (28 & 29 *Vict. c.* 126) *s.* 5—*Reformatory Schools Act*, 1866 (29 & 30 *Vict. c.* 117) *ss.* 14, 23—*Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4, 57.

8 Q.B.D. 340

By the Prison Act, 1877, the "prison authority," constituted under the Prison Act, 1865, s. 5, is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1866, ss. 14, 23; for expenses of that description fall within the definition of "maintenance of a prisoner" contained in the Prison Act, 1877, s. 57, and must be defrayed out of moneys provided by Parliament under s. 4.

Judgment of the Queen's Bench Division (4 Q. B. D. 329) affirmed.

APPEAL by the plaintiffs from the judgment of Cockburn, C.J., and Mellor, J., in favour of the defendants, upon a special case.

The facts are fully set forth in the report of the proceedings before the Queen's Bench Division (1), and it is here necessary only to state that the question between the parties was, whether the plaintiffs were entitled to recover from the defendants the cost of a suit of clothes supplied to, and requisite for, a boy named Mulloch upon his removal to the *Akbar*, a ship duly certified as a reformatory school, from the borough prison of Liverpool, where he had been undergoing a sentence of imprisonment.

(1) 4 Q. B. D. 329.

A. L. Smith, for the plaintiffs. By the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 14, a youthful offender may be sentenced to be imprisoned and to be afterwards sent to a certified reformatory school for not less than two and not more than five years; and by s. 23, the expense of conveying him to the school "and the expense of proper clothing for him, requisite for his admission to the school, shall be defrayed as a current expense by the prison authority within whose district he has been last imprisoned." By s. 24, the commissioners of the Treasury may contribute, out of money provided by parliament, upon the recommendation of a secretary of state, towards the expenses of the custody and maintenance of an offender detained in a certified reformatory school, and of his removal. The effect of these sections before the passing of the Prison Act, 1877 (40 & 41 Vict. c. 21), was that, subject to a contribution from the Treasury, the prison authority was bound to pay the cost of conveying a youthful offender to the reformatory school, and of providing him with clothing requisite for his admission. By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 5, it was enacted that the prison authority of a county should be the justices in quarter sessions assembled, and of a municipal borough the council of the borough. Therefore the expenses above-mentioned were payable out of the county rate and borough rate respectively. By the Reformatory Schools Act, 1866, s. 28, a prison authority had power to contribute towards the alteration or enlargement of a reformatory school, and towards the support of the inmates therein. Upon the passing of the Prison Act, 1877, the superintendence of prisons was transferred to the plaintiffs, and the cost of maintaining them and the prisoners in them devolved upon the Imperial revenue (s. 4). Nevertheless the burden thus cast upon the revenue must not be unduly extended: the maintenance of a person is to be paid for by the state, only so long as he is a prisoner. The suit of clothes was required for the boy Mulloch, in order that he might be put to a school: his term of imprisonment had expired; and the cost of the clothes was not part of his maintenance in prison, as defined by the Prison Act, 1877, ss. 4, 57. Therefore the liability to pay for the suit of clothes was not transferred to the plaintiffs: the burden is

1880

PRISON COMMISSIONERS v. CORPORATION OF LIVERPOOL.

not to be met by Imperial taxation. The plaintiffs have discharged their duty when they have conveyed the boy to the training ship. The defendants are liable to pay for the clothes by force of the Reformatory Schools Act, 1866, s. 23, already mentioned. The powers of justices in quarter sessions and of the council of the borough are preserved by the Prison Act, 1877, ss. 52, 61, and this shews an intention to preserve also their liabilities. It is necessary to draw a line, beyond which the liability of the state shall not extend, and the restriction upon liability suggested by the plaintiffs is very reasonable. The Prison Act, 1877, has not relieved the former prison authorities from all expenses connected with prisoners: they are still liable for the conveyance of them to gaol; and it may well be that the intention of the legislature was that the ratepayers should not be indiscriminately relieved at the expense of the taxpayers.

Herschell, Q.C., for the defendants, was not called upon to argue.

LORD COLERIDGE, C.J. I am of opinion that in this case our judgment must be for the defendants.

The question arises in respect of a sum of thirty shillings, which is the proper cost of a suit of clothing supplied to a prisoner, who was sentenced to be imprisoned in the Liverpool gaol, and to be, at the expiration of the term of imprisonment, under the Reformatory Schools Act, 1866, conveyed to the *Akbar*, a ship lying in the Mersey and fitted up as a reformatory school, into which he would not be received without the suit of clothes.

It has been admitted that, under 29 & 30 Vict. c. 117, the expense of this suit of clothes would clearly have had to be borne by the corporation of Liverpool, they being at the time the prison authority within the definition of the Prison Act, 1865, and the dispute is really whether by virtue of subsequent legislation these clothes are to be paid for by the state, or whether they are to be paid for by counties and boroughs, which still remain for certain purposes the prison authorities. The Prison Act, 1877 (40 & 41 Vict. c. 21), s. 4, enacts that all expenses incurred in respect of the maintenance of prisoners in prison shall be defrayed by the state. By the interpretation clause (s. 57) "the maintenance of a prisoner includes all such necessary expenses incurred

in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been payable by a prison authority." It seems to me that this section by its very words decides this question, because the suit of clothing of Mulloch is a part of his maintenance in respect of his removal from one place of confinement to another. It has been argued that detention in a reformatory is not detention in a prison. In a certain sense that is no doubt true; but s. 57 uses the expression, "place of confinement;" and if the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), ss. 20, 21, 22, be looked at, it will be seen that for certain purposes reformatory schools are undoubtedly places of confinement or detention. To escape from them before the expiration of the sentence of detention is made an offence punishable with three months' imprisonment and hard labour, and the boys are sent and detained there against their will; their liberty is interfered with by the sentence of the Court. Therefore, although they are not kept in a prison properly so called, they are confined in a place of detention under the authority of the law. I am of opinion upon this ground, that by the words of ss. 4, 57, the expense of providing clothing for a child removed from a prison to a reformatory is transferred from the borough to the state. The cost of the clothes is an expense incident to the removal, for without them the boy would not have been received into the training ship from the prison of the borough.

BRAMWELL, and THESIGER, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiffs: *Hare & Fell, for the Solicitor to the Treasury.*

Solicitors for defendants: *F. Venn & Son, for Joseph Rayner, Liverpool.*

1880 THE QUEEN, ON THE PROSECUTION OF SIR J. T. INGHAM, *v.*
Feb. 21. TRUELOVE.

Criminal Law—Trade in Obscene Books—Death of Complainant—Abatement of Proceedings—20 & 21 *Vict. c.* 83, *ss.* 1, 2, 3, 4.

Complaint having been duly made under 20 & 21 Vict. c. 83, that obscene books were kept by the defendant in his shop for sale, a warrant for the seizure of such books was issued, and after they had been seized the defendant was summoned to shew cause why they should not be destroyed. Upon the hearing of the summons an order was made for the destruction of the books. After the issuing of the summons, but before the hearing, the complainant died, and no application to substitute another complainant was made:—

Held, that the proceedings against the defendant did not lapse upon the death of the complainant, and that the order was valid.

Upon appeal to the Middlesex Sessions against an order by a metropolitan police magistrate under 20 & 21 Vict. c. 83, the order was confirmed, subject to a case, of which the following is the material part.

On the 15th of May, 1877, one of the magistrates of the police court at Bow Street, upon the complaint of John Green, granted a special warrant under 20 & 21 Vict. c. 83, s. 1 (1), directing

(1) By 20 & 21 Vict. c. 83, s. 1: "It shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, upon complaint made before him upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, &c., are kept in any house, shop, &c., within the limits of the jurisdiction of any such magistrate for the purpose of sale or distribution, &c., and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, to give authority by special warrant to any constable or police officer into such house, shop, &c., to enter, and to search for and seize all such books, papers, &c., and to carry the articles seized before the magistrate issuing the said warrant—and such magistrate shall thereupon issue a summons calling upon the occupier of the house, &c., to appear within seven days before such magistrate to shew cause why the articles so seized should not be destroyed;" and at the hearing the magistrate, subject to certain conditions, may make an order in the terms of the summons.

By s. 4: "Any person aggrieved by any act or determination of such magistrate in or concerning the execution of this Act, may appeal to the next general or quarter sessions, giving to the magistrate whose act or determination shall be appealed against, notice in writing of such appeal, and of the grounds thereof, and such Court, upon

one of the inspectors of the metropolitan police to search the premises of Edward Truelove, of 256, High Holborn, Middlesex, and seize all obscene books, papers, or writings found on his premises.

On the same day, the 15th of May, 1877, the inspector, by virtue of the warrant, entered the premises and therein seized a number of copies of two pamphlets entitled "Individual, Family, and National Poverty," and "Moral Physiology," respectively.

On the 16th of May, the magistrate granted a summons requiring Truelove, as occupier of the premises, to appear on the 22nd of May, 1877, at the police court, Bow Street, to shew cause why the pamphlets seized on his premises should not be destroyed.

On the 22nd of May, 1877, the summons came on for hearing at the police court, and was adjourned from time to time until the 4th of October, 1878, when the magistrate made an order adjudging the pamphlets to be obscene, and ordering that all of them should be destroyed within seven days.

On the 10th of October, 1878, Truelove gave notice of appeal against the order, and entered into recognizances to prosecute the appeal at the next Middlesex Sessions. The sessions from time to time adjourned the appeal, which finally came on to be heard on the 26th of April, 1879. It then appeared in evidence that J. Green, the complainant, died on the 25th of May, 1877.

At the close of the respondent's case, the counsel for the appellant made the objection that after the death of the complainant, J. Green, all proceedings against the appellant lapsed, as there was then no person in the position of prosecutor. For the respondent it was contended that the proceedings did not so lapse, and that, even if they did, the Court could not give effect to the objection as it was not included in the grounds of appeal. The appellant replied that in the absence of a prosecutor or complainant the sessions had no power to deal with the order, and the objection therefore being one as to jurisdiction, it was not necessary for it to be included in the grounds of appeal.

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hearing and finally determining such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper," &c.

1880

THE QUEEN v. TRUELOVE.

The assistant judge then asked whether an application had been made to the magistrate who made the order to substitute another prosecutor for J. Green. On being answered in the negative, the judge held that the appellant's objection was a good one, and the sessions so decided, but held that they could not give effect to it as it was not included in the grounds of appeal.

The appeal was then heard on the merits, and the Court being of opinion that the pamphlets were obscene within the meaning of the Act, affirmed the order with costs.

The questions for the Court were:—

1. Whether the proceedings against the appellant lapsed upon the death of the complainant, J. Green.

2. Whether, if they did so lapse, the fact that the objection was not included in the appellant's ground of appeal, precluded the Court of quarter sessions from giving effect to the objections.

Mead, for the prosecution. The material question raised upon the case is whether the proceedings against the defendant lapsed upon the death of Green, the complainant. A complaint under 20 & 21 Vict. c. 83, is essentially a criminal proceeding, and does not abate on the death of the prosecutor, who is only a nominal party, and has no control over the suit.

[He was stopped.]

W. A. Hunter (*J. M. Davidson*, with him), for the defendant. In proceedings under 20 & 21 Vict. c. 83, it is essential that there should throughout be an informer who may be liable to pay costs in case the party convicted should be successful upon an appeal to sessions. The magistrate cannot support the order which he has made, for *Rex* v. *Hants* (1) has decided that where a penal statute contains provisions for appealing from a conviction similar to those in the present Act, the justices, though notice of the appeal is directed to be given to them, are not liable to pay costs. The Act 20 & 21 Vict. c. 83, shews that the continued existence of a prosecutor is contemplated. Sect. 4, after providing for notice of appeal to the magistrate or justices, directs that the sessions, upon appeal, may, in their discretion, award costs to the party appealing or appealed against, and that the "appellant" is not to give

(1) 1 B. & Ad. 654.

evidence of any grounds of appeal except those stated in the notice of appeal. *Rex* v. *J. J. Leicestershire* (1), where it was held that a bastardy appeal could be heard although the respondent had died before notice of appeal was posted to her, is distinguishable, for there the omission was unavoidable, and here another prosecutor might have been substituted.

[LUSH, J. Suppose that the prosecutor died immediately after the service of the summons, why should not the person who appeared to conduct the prosecution be considered as the prosecutor?]

The defendant ought not to be left in doubt as to who is the actual party to the proceedings.

Mead, in reply. In *Waller* v. *Hanger* (2), which was an information for prisage, and the question was whether the information abated by the death of the plaintiff, the Court were of opinion that by the death of the plaintiff, the informer, the action did abate, but that it was otherwise in the case of a relator upon whose relation the attorney general prosecuted, for there the death of the relator did not abate or determine the suit. The death of the complainant cannot in any respect alter the character of the proceedings.

LUSH, J. I think that the sessions were right in affirming the order of the magistrate, and that the proceedings against the defendant did not lapse upon the death of Green, the complainant. These proceedings, which were taken under 20 & 21 Vict. c. 83, cannot be liable to abatement in the same manner as civil or quasi civil proceedings are liable to abatement by the common law, for they are essentially criminal proceedings. The Act enables a magistrate, upon a complaint upon oath that obscene books or papers are kept for sale in a house or shop, to grant a warrant authorizing a constable to seize and carry them before the magistrate granting the warrant. This warrant is therefore similar to an ordinary search warrant, and on the further prosecution of the proceedings the presence of the complainant is never necessary. I need not say that it cannot be desirable in the interests of the public that the complainant should have full

(1) 15 Q. B. 88. (2) 2 Bulstr. 134, 261.

1880

THE QUEEN v. TRUELOVE.

control over the proceedings in a prosecution for selling obscene publications, so that it might be in his power at any stage to withdraw them, and to make terms with the defendant. Then, can we find anything in the Act to lead us to suppose that the complainant is so material a party to the proceedings as it has been suggested that he is? Sect. 1 is as follows: [The learned judge read the introductory part of the section.] As I have already said, the section makes provision for a warrant which is closely analogous to the ordinary search warrant; and, after the seizure of the articles under this warrant, the magistrate is to issue a summons calling upon the occupier within seven days to appear and shew cause why such articles should not be destroyed, without requiring the complainant to take any further part in the matter. Sect. 4, which gives an appeal against orders, made under the Act, rather strengthens the inferences which would be drawn from the previous sections. The person aggrieved is to give notice to the magistrate whose act or order is appealed against, but there is nothing to require him to give notice to the party complaining, and the sessions in determining the appeal are to award such costs to the party appealing or appealed against as they may think proper. The counsel for the defendant mainly relied upon these last words, as shewing that it is essential that there should be a complainant to appeal against. But I cannot see why, if upon the death of the complainant some other person takes up the prosecution, he should not be liable to pay costs if the appeal should be successful. It could readily be ascertained as a matter of fact who was the party virtually prosecuting the appeal. There is nothing to shew that the same person who originally made the complaint must always be party to the appeal.

MANISTY, J. I am of the same opinion. It is unnecessary to say anything as to the second question raised upon the case.

Order confirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitors for defendant: *Harper, Broad, & Battcock.*

[CROWN CASE RESERVED.]

1880
March 6.

THE QUEEN *v.* CUMPTON.

Justices, Jurisdiction of—Warrant of Commitment—Backing of Warrant—Police, County—Police, Borough — Arrest—Constable—Assault on Constable—5 & 6 *Wm.* 4, *c.* 76, *ss.* 76, 101; 19 & 20 *Vict. c.* 69, *s.* 6; 11 & 12 *Vict. c.* 43, *s.* 3.

C. was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine, but not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. C. was not pursued from the county, but found in the city:—

Held, by the Court (Lord Coleridge, C.J., Pollock, B., Field and Stephen, JJ.), that the conviction was wrong, that the constables were not acting in the execution of their duty in so executing such warrant.

THE prisoner was convicted before the Recorder of Worcester on a charge of assaulting two police constables in the execution of their duty. He was also charged with a common assault. He was convicted on both charges, and sentenced to twelve calendar months' imprisonment with hard labour on the first charge, and to six months' imprisonment with hard labour on the second, the two sentences to run concurrently. The question reserved was, whether the conviction on the first charge could be supported.

The assault as to which the question arose was committed on two police constables of the county police force of Worcestershire, who were apprehending the prisoner within the city of Worcester, under a warrant issued by two county justices for his commitment to prison for default in payment of a fine. Worcester is a city and county, having a separate commission of the peace, with exclusive jurisdiction, and a separate police force. The warrant was not backed by any city justice. The prisoner was not pursued from the county of Worcestershire, but found in the city.

1880

THE QUEEN v. CUMPTON.

It was contended for the prisoner that the constables had no authority to arrest him within the city, and were therefore not assaulted in the execution of their duty.

J. J. Powell, Q.C. (*Patrick Evans*, with him), for the prisoner. Worcester is not a mere borough, it is a city and county having a separate commission of the peace. The charter was granted by James I. It is as much a separate county from Worcestershire as any two distinct shires are separate counties.

[LORD COLERIDGE, C.J. It is also a borough specified in Schedule A. of the Municipal Corporations Act, 1835 (5 & 6 Wm. 4, c. 76), to which therefore, by s. 1 of that statute, certain provisions of that statute apply, notwithstanding any previous charter.]

It is no doubt specified in that schedule. Reliance is placed by the prosecution on 19 & 20 Vict. c. 69, s. 6, which enacts that county constables shall have in every borough situate wholly or in part within such county, or within any county in which they have authority, all such powers and privileges and be liable to all such duties and responsibilities as the constables appointed for such borough have and are liable to within any such county. The contention for the prisoner is, that this section does not apply, that Worcester is a separate county, not a borough situate in Worcestershire. If, however, the section does apply, and Worcester is to be treated as a borough, it gives Worcestershire county constables the same powers in Worcester that Worcester borough constables have in Worcestershire. Now the borough constables' powers, as defined by 5 & 6 Wm. 4, c. 76, ss. 76, 101, do not extend to executing warrants of commitment in the county or shire. The borough of Worcester is not within the jurisdiction of the county justices. Their warrant, unbacked, does not run there. By 5 & 6 Wm. 4, c. 76, s. 111, it is enacted that no part of any borough in and for which a separate court of quarter sessions of the peace shall be holden shall be within the jurisdiction of the justices of any county from which such borough was exempt before that Act.

H. Matthews, Q.C. (*R. H. Amphlett*, with him), for the prosecu-

tion. It is convenient first to state that the Act 19 & 20 Vict. c. 69, deals with counties of cities, as boroughs; this is apparent from the preamble, and from s. 30. In the earlier statute 5 & 6 Wm. 4, c. 76, also, such counties are dealt with as boroughs.

At common law the parish constable was the officer to enforce warrants, his jurisdiction was limited to the parish. He was not bound to go out of his parish: *Case of the Village of Chorley.* (1) Primâ facie his jurisdiction was limited, but if the warrant was directed to him by name, he might execute it in any place in which such warrant ran. It was a proper and lawful command to arrest Cumpton. By 5 & 6 Wm. 4, c. 76, s. 76, borough constables are to apprehend offenders against the peace within the county in which the borough is situate, and to have all the powers and duties of constables at common law within their constablewicks, within such county, and to obey all lawful commands of justices having jurisdiction within any county in which they shall be called on to act as constables. Therefore a Worcester borough constable might execute a warrant of commitment in the county. If so, then 19 & 20 Vict. c. 69, s. 6, which gives county constables the same powers in boroughs within the county, as borough constables have in such county, renders it lawful for a warrant to be executed by a county constable in the borough.

[LORD COLERIDGE, C.J. The question is whether the constable was properly empowered, the warrant being unbacked.]

By 5 & 6 Wm. 4, c. 76, s. 76, the borough constable acts in the county, and by 19 & 20 Vict. c. 69, s. 6, the county constable has the like power in the borough. Sect. 101 of 5 & 6 Wm. 4, c. 76, deals with documents precedent to conviction, and does not, as to warrants of commitment, cut down the effect of s. 76. If the warrant had been backed by a city justice it could undoubtedly have been executed by a county constable in the city. The command therefore of the county justices to arrest Cumpton in the city was a lawful command, one which by the statutes the county constables were to obey, and which they do obey. It is in obeying such command that the assault is committed. Further, it

(1) 1 Salk. 176.

1880

THE QUEEN v. CUMPTON.

may be that Cumpton was an offender against the peace within the meaning of 5 & 6 Wm. 4, c. 76, s. 76.

LORD COLERIDGE, C.J. We have to consider a case reserved by the Recorder of Worcester, which is purely a question of jurisdiction. Justice is not seriously concerned in the matter, the prisoner is now undergoing punishment for a common assault, and the question is whether he should also be punished for an assault as for an assault upon a constable in the execution of his duty.

Now it is the fact that Worcester is a borough, and a county of a city. It was contended that something turned upon this latter fact of Worcester being a county of a city. We, however, think that nothing does turn upon such fact, and our judgment is upon the statutes dealing with Worcester as a borough.

The argument is that Worcester is a borough situate in Worcestershire, and that the county constables may execute warrants either there or in the county or shire by virtue of 19 & 20 Vict. c. 69, s. 6. Now, even if s. 6 of 19 & 20 Vict. c. 69 stood alone, I think it would be doubtful whether the execution of a warrant of commitment, issued by a justice not having authority within the jurisdiction where it was to be executed, came within the "powers and privileges" or "duties and responsibilities" mentioned in the section referred to; but when we look at the provisions of this section, as expounded by the Municipal Corporations Act (5 & 6 Wm. 4, c. 76), the matter becomes quite clear. The section in question is, in its affirmative provisions, the same, mutatis mutandis, as s. 76 of the Municipal Corporations Act, but s. 101 of that Act provides that the borough police may execute certain specified summonses and warrants beyond the jurisdiction of the person issuing them, although not "backed." It is admitted that a warrant of commitment is not one of the orders specified in that section. By inference the police have no power to execute unbacked warrants outside their jurisdiction in cases other than those specified, and the warrant in this case is therefore not one which the borough justices could authorize the borough police to execute in the county. Now it is admitted that the later Act only empowers the county justices to authorize

the execution within the borough of such process, as the borough justices could authorize the execution of within the county. Therefore in this case the constables were not acting in the execution of their duty, and the conviction must be quashed.

GROVE, J. I think this conviction cannot be sustained without unduly straining the words of the statutes. This warrant is clearly not one of those specified in 5 & 6 Wm. 4, c. 76, s. 101, for the prisoner cannot be said to be a person "charged with any offence," nor is that section in any way enlarged by s. 76, which relates to the duties of constables only. Sect. 101 relates to the duties and powers of justices, s. 76 to those of constables.

POLLOCK, B. I think that it would be impossible to affirm this conviction without disregarding all sound rules which should guide the Court in the construction of statutes. I think that s. 76 is intended to define the protection to which the constable is entitled in the discharge of his duties, and does not relate to the manner in which he is to carry out a lawful command, such as the execution of a warrant. Sect. 76 being then silent on this point, we find s. 101 expressly dealing with cases where the duties of constables in the execution of certain specified warrants are pointed out; and it being admitted that this warrant is not one of those specified in s. 101, I think the conviction must be quashed.

FIELD, J. I am of the same opinion. In this case it lies on the prosecution to make out that the constable has the power contended for, and in this I think they have failed. In my opinion s. 76 relates rather to the status of the constable than to the question of jurisdiction; while the particular warrant in this case does not bring it within s. 101, for the prisoner cannot be said to be a person "charged with any offence."

STEPHEN, J. I have come to the same conclusion, though not without considerable doubt. I will only add one observation to what has been said, and that is as to s. 76. The effect of s. 76 seems to me to be this, that the borough constables are to have within certain enlarged local limits all the powers and duties of

1880

THE QUEEN v. CUMPTON.

other constables, and that within the same limits they are to obey all the lawful commands they may receive, but it does not shew what the conditions are which render such commands lawful. To find out what they are we have to look at s. 101, and the enactments as to backing warrants in Jervis's Acts. The result, speaking generally, is, that if warrants are to be executed outside the jurisdiction of the justices issuing them, they must be backed, except in the cases enumerated in s. 101. This case is not one of those enumerated; and therefore the general rule applies, the warrant should have been backed.

Conviction quashed.

Solicitors for prosecution: *Bolton, Robbins, & Busk, for Curtler & Davis, Worcester.*

Solicitors for prisoner: *Church, Sons, & Clarke, for Southall, Worcester.*

May 25.

STEVENSON, JAQUES, & Co. *v.* McLEAN.

Contract—Sale of Goods—Offer, till when open—Refusal of Offer, what amounts to—Revocation of Offer, when effective.

The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40*s.* per ton, nett cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 P.M. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 P.M. found a purchaser for the iron, sent a telegram at 1.34 P.M. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent.

The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiffs' telegram was sent at 9.42 A.M. how prices would range during the day:—

Held, by Lush, J., that under the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that, although

the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable.

Cooke v. *Oxley* (3 T. R. 653) discussed.

Bryne & Co. v. *Leon van Tienhoven & Co.* (49 L. J. (C.P.) 316) followed.

FURTHER CONSIDERATION before Lush, J. The facts and arguments sufficiently appear from the judgment.

May 7. *Waddy, Q.C.*, and *Hugh Shield*, for the plaintiffs.
Cave, Q.C., and *Wormald*, for the defendant.

Cur. adv. vult.

May 25. LUSH, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40*s.* per ton, nett cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for 1900*l.*, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on the 7th of May last.

The plaintiffs are makers of iron and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on the 24th of September to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39*s.*, which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I

1880

STEVENSON v. McLEAN.

shall probably be able to wire you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms :—

"Referring to R. A. McLean's letter to you re warrants, I have seen him again to-day, and he considers 39*s.* too low for same. At 40*s.* he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram :—

"Cannot make an offer to day; warrants rather easier. Several sellers think might get 39*s.* 6*d.* if you could wire firm offer subject reply Tuesday noon."

In answer to this Fossick wrote on the same day: "Your telegram duly to hand re warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39*s.* 6*d.*, but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows :—

"Mr. Fossick's clerk shewed me a telegram from him yesterday mentioning 39*s.* for No. 3 as present price, 40*s.* for forward delivery. I instructed the clerk to wire you that I would now sell for 40*s.*, nett cash, open till Monday." No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for 40*s.*, nett cash, and would hold it open all Monday. This it was admitted must have been the meaning of "open till Monday."

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10.1 A.M.,

and was delivered at the defendant's office in the Old Jewry shortly afterwards.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40*s.*, nett cash, and at 1.25 sent off a telegram to the plaintiffs: "Have sold all my warrants here for forty nett to-day." This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant: "Have secured your price for payment next Monday—write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed: "Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied: "Your two telegrams received, but your sale was too late; your sale was not per my instructions." And to this the plaintiffs rejoined: "Have sold your warrants on terms stated in your letter of twenty-seventh."

The iron was sold by plaintiffs to one Walker at 41*s.* 6*d.*, and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40*s.*

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: first, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only

1880

STEVENSON v. McLEAN.

as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to *Hyde* v. *Wrench* (1), where one party offered his estate for 1000*l.*, and the other answered by offering 950*l.* Lord Langdale, in that case, held that after the 950*l.* had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in *Cooke* v. *Oxley* (2), that in order to constitute a contract there must be the assent or concurrence

(1) 3 Beav. 334. (2) 3 T. R. 653.

of the two minds at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of *Cooke* v. *Oxley* (1) does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till 4 in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before 4 o'clock. The Court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till 4 o'clock, and that the alleged promise to wait was nudum pactum.

All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with *Cooke* v. *Oxley*. (1) It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end: see *Routledge* v. *Grant*. (2) But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it: *Adams* v. *Lindsell*. (3) "Common sense tells us," said Lord Cottenham, in *Dunlop* v. *Higgins* (4), "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal.

(1) 3 T. R. 653.
(2) 4 Bing. 653.
(3) 1 B. & A. 681.
(4) 1 H. L. C. 381.

1880

STEVENSON v. McLEAN.

Cooke v. *Oxley* (1), if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in *Cooke* v. *Oxley* (1), the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our Courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted": *Tayloe* v. *Merchants' Fire Insurance Co.* (2); and in *Bryne & Co.* v. *Leon Van Tienhoven & Co.* (3) my Brother Lindley, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40*s.*, nett cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for 1900*l.*, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for 1900*l.* The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Dodds & Co.*

Solicitors for defendant: *Harries, Wilkinson, & Raikes.*

(1) 3 T. R. 653. (2) 9 How. Sup. Court Rep. 390.
(3) 49 L. J. (C P.) 316.

THE QUEEN *v.* HUTCHINS.

1880
May 5.

Estoppel—Res Judicata—Justices, Summary Proceedings before—Adjudication that Street is a Highway—Grounds of Appeal—Paving Expenses—Certificate of dismissal of Complaint—11 & 12 *Vict. c.* 43, *s.* 14—38 & 39 *Vict. c.* 55, *s.* 150.

An application to justices by a local board under the Public Health Act, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. The local board some years after made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the said street, and the justices made an order for the payment of such expenses:—

Held, that the adjudication of the justices, that the street was a highway repairable by the inhabitants at large, on the first application was conclusive of the question upon the second, and that the justices were therefore bound to dismiss the second application.

Held, also, that the certificate of dismissal of a complaint provided for by 11 & 12 Vict. c. 43, s. 14, is merely intended for a convenient mode of proving the dismissal, and the adjudication was none the less conclusive because no such certificate had been given.

Held, also, that, on appeal to the sessions against the order of justices made on the second application, the previous adjudication could be proved and was conclusive evidence, under a ground of appeal alleging that the street in question was a highway repairable by the inhabitants at large.

Case stated by the quarter sessions of the hundred of Salford, on appeal against an order of justices in petty sessions. The facts were in substance as follows:—

The appellant was the owner of certain premises abutting on a street. The local board of the district in which the premises were situated gave notice in the year 1873, under the provisions of the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 69), to the owners of the premises abutting on the street to sewer and channel the same, and the owners making default in so doing the board proceeded to do the work themselves. The appellant refusing to pay the proportion of the expenses charged upon him by the apportionment of the expenses made in pursuance of the Act, the local board, in 1874, summoned him before the magistrates to enforce payment of the same. The magistrates dismissed the summons on the ground that the street was a highway repairable by the inhabitants at large, and therefore not within

1880

THE QUEEN v. HUTCHINS.

the terms of the 69th section of the Act. No formal order of dismissal was drawn up, nor any certificate of dismissal applied for or given to the appellant, but there was a note made in the book kept by the clerk to the magistrates by such clerk stating the names of the parties, the nature of the application, and that it was dismissed on the ground that the street was a highway. There was no appeal by the local board against such dismissal. The local board in 1877 gave notice under the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 150), to the owners of premises abutting on the street to pave and flag the same, and the notice not being complied with proceeded to do the work themselves. The appellant again refusing to pay the proportion of the expenses charged upon him by the apportionment in respect of his premises, the local board in the year 1879 took out a summons before the magistrates for the recovery of such proportion. It was contended for the appellant at the hearing that the matter was res judicata, that the previous adjudication that the street was a highway repairable by the inhabitants at large was conclusive that such was the case, and that the summons ought therefore to be dismissed. The magistrates, however, on the evidence laid before them found that the street was not a highway repairable by the inhabitants at large, and made an order for the payment of the expenses sought to be recovered. Against this order the appellant appealed to the quarter sessions. One of the grounds of appeal was that the street was a highway repairable by the inhabitants at large, but there was no ground of appeal specifically taking the point that the previous adjudication was conclusive. It was contended before the sessions on behalf of the appellant that the previous adjudication that the street was a highway was conclusive upon the second application, but the sessions refused to give effect to this contention, holding that the point was not open to the appellant upon the grounds of appeal. An application was made to the sessions, on behalf of the appellant, for an amendment of the grounds of appeal in this respect, but refused. The sessions, after hearing the evidence on the question whether the street was a highway, affirmed the order of the magistrates. The questions stated for the opinion of the Court were, 1st, whether it was open to the appellant to

contend before the sessions that the previous adjudication was conclusive; 2ndly, whether the sessions ought to have amended the grounds of appeal (power being reserved by the case to the Court to make any amendment that they thought ought to have been made by the sessions), and, 3rdly, whether, assuming that the point was open to the appellant, the previous adjudication was conclusive.

Hopwood, Q.C., for the respondents (the local board). There is no estoppel, because the appellant did not procure a certificate of the dismissal of the complaint under 11 & 12 Vict. c. 43, s. 14. It is submitted that the necessary implication arising from the terms of that section is that, unless such certificate, which the magistrates have a discretion to withhold, is given, the dismissal of the complaint cannot be in any way a bar to future proceedings, or conclusive as an adjudication on the questions involved. At most, it was analogous to a nonsuit. There was no estoppel until the order of dismissal had been drawn up and the certificate given.

It is further submitted, that, even if this is not so, the point that the previous adjudication was conclusive was not open upon the grounds of appeal, and the sessions were right in refusing to amend. The Court will not amend the grounds of appeal in order to allow an estoppel to be taken advantage of contrary to what must be presumed to be the truth of the matter.

The doctrines to be found in the books with regard to estoppels (which are collected in the note to the *Duchess of Kingston's Case* (1)) apply to the more solemn and deliberate adjudications of courts of record, not to the summary and informal proceedings before magistrates. It would be a most inconvenient consequence if, because a summary application made inadvertently without sufficient materials were dismissed, it should be a binding and conclusive adjudication for all purposes in future.

Ambrose, Q.C., for the appellant, was not called upon.

LUSH, J. I am of opinion that our judgment should be for the appellant. My judgment is based upon a principle of the utmost

(1) 2 Sm. L. C., 5th ed., 656.

1880

THE QUEEN v. HUTCHINS.

importance, viz., that when a matter such as this, affecting rights of property, has once been decided by a competent tribunal, the decision is conclusive as between the parties to it. In 1874 the appellant was summoned by the respondents before the magistrates for nonpayment of the proportion of the expenses of sewering and channelling the street charged upon him. The respondents were bound to allege that the street was not a highway repairable by the inhabitants at large, and this was the particular issue which the magistrates had to determine. If the street was such a highway, the parish were bound to repair it, not the owners of property. The magistrates, on the hearing of the summons, decided that the appellant was not liable, because the street was a highway repairable by the inhabitants. This finding was conclusive with regard to the claim against him for those repairs. The board might have appealed if that decision had been in any respect unsatisfactory. They did not do so, but acquiesced in the decision till 1879. We do not know what dealings may have taken place with regard to the property on the faith of that decision in the interval. Then, in 1879, having done further works to the street in the shape of paving, the board took out another summons and sought to try the same question over again. It seems to me that the first decision was binding on the local board: see *Reg.* v. *Haughton.* (1) It is said that it cannot be a bar as no order of dismissal was drawn up, nor any formal certificate procured. But the certificate is not of the essence of the matter. It is only a convenient mode of proof created by the Act for proving what was provable otherwise at common law. The certificate is like the certificate of a previous conviction, a short mode of proving what must otherwise have been proved in a more expensive manner. Though no order was drawn up, there was a note entered in the clerk's note book, stating the names of the parties, the nature of the application, and the result of it, and that it was dismissed because the street was a highway, by which must necessarily be meant, having regard to the subject-matter, a highway repairable by the inhabitants at large. It seems to me that the adjudication in 1874 was sufficiently proved before the magistrates. The magistrates on the second occasion decided the contrary way, viz., that

(1) 1 E. & B. 501; 22 L. J. (M.C.) 89.

the street was not a highway repairable by the inhabitants at large. Against that decision there was an appeal. The sessions refused to entertain the argument that the question was concluded by the previous decision, on the ground that this was not alleged as a ground of appeal. But one of the grounds of appeal is that the street was a highway repairable by the inhabitants at large, though the point was not specifically taken by the grounds of appeal that the previous adjudication was conclusive. It seems to me that it was not necessary to state how the allegation was going to be proved. If the previous adjudication had been stated as a ground of appeal the party could not have demurred to it. The justices were bound to receive the evidence, and when the previous decision was proved they were bound to act upon it. It was the adjudication of a competent Court between the same parties as to the status of this street, and therefore was conclusive and binding. It seems to me that there was no need for any amendment of the grounds of appeal.

FIELD, J. I am of the same opinion. The first question is, whether, upon the grounds of appeal, it was open to the appellant to contend that the previous adjudication was conclusive. I agree with my Brother Lush in thinking that upon the grounds of appeal this contention was open to the appellant. The adjudication was at the least admissible in evidence, and I think the contention that it was conclusive was open, on the ground of appeal which raised the question whether this street was a highway repairable by the inhabitants at large or not. I do not think that grounds of appeal ought to be construed as pleadings. The books are full of the finest points with regard to the construction of grounds of removal and appeal, but I hope that the day for such subtleties has gone by. Again, I think, if an amendment was necessary, it ought to have been made. I think the power of amendment ought to be exercised, where the other party is not unjustly prejudiced by the amendment. Here the point having been taken before the magistrates, the respondents knew that it would be raised on the appeal. It is therefore open to us to consider the main point, viz., whether the former adjudication was conclusive. A good deal has been said in the argument about

1880

THE QUEEN v. HUTCHINS.

estoppel. It was urged that estoppels ought not to be regarded with much favour. This is not however a mere question of estoppel. If a competent Court has once decided a question, it seems to me that the presumption should be that their decision is the truth. A competent tribunal adjudicated between the parties on the question whether the street upon which this property abutted was a highway,—a very important incident of property, it may be observed, with regard to its value, because access would be thus had to it without paying for repairs of the road. I do not see why we should doubt that the adjudication was correct on the materials before the magistrates, and it was the fault of the local board if they had not the proper materials forthcoming to prove their case if such existed. There was moreover no appeal against that decision. Then, this having taken place in 1874, in 1879, five years afterwards, the local board seeks to reopen the question. We do not know what dealings may have taken place in the interval on the faith of the decision as to the status of this property.

It is urged that the adjudication is not conclusive because no certificate of dismissal was drawn up. With regard to that point I agree with my Brother Lush. It seems to me that if ever there was a case in which the doctrine of res judicata ought to apply this is the case.

Order of sessions quashed.

Solicitors for appellant: *Norris, Allen, & Co., for Diggles & Ogden.*

Solicitors for respondents: *Gregory & Co., for H. & G. W. Fox.*

[IN THE COURT OF APPEAL.]

1880
April 8.

SEYMOUR *v.* COULSON AND ANOTHER.

WHARTON AND OTHERS, CLAIMANTS.

*Practice—County Court, Appeal from—*38 *&* 39 *Vict. c.* 50, *s.* 6*—Omission to request Judge to take Note—Note actually taken and furnished—Right to Appeal—Bankruptcy—Composition—Invalid Resolution—Sale of Debt—Bill of Sale—Assignment by Debtor to Surety.*

At the hearing of an interpleader claim in a county court, the judge was not asked to make a note of any question of law raised or of the facts in evidence as provided by 38 & 39 Vict. c. 50, s. 6. He did, however, take a note of the evidence, and upon being applied to afterwards by the claimant, against whom he decided, furnished him, but under protest, with a copy of the note and his written judgment, in each of which was a statement of the points of law raised and determined:—

Held, that the omission to request the judge to take a note did not deprive the claimant of the right to appeal by motion under s. 6.

P. having filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, his creditors, except G., resolved to accept a composition of 5*s.* in the pound, payable by instalments. W. became surety for the composition, and P. assigned his property to W. by a duly registered bill of sale. W. bought the debt due to G., and was thereby enabled to vote in his name at the second meeting of creditors. The resolutions for composition had not been set aside. The plaintiff having obtained judgment against P., seized a stack of hay comprised in the bill of sale:—

Held, that the resolutions not having been set aside, the bill of sale could not be impeached, and the plaintiff could not enforce his execution against the property assigned to W.

RULE calling on the plaintiff to shew cause why the judgment given for him upon an interpleader claim in the county court of Durham, holden at Darlington, should not be set aside and entered for the claimants, on the ground that a bill of sale given by one of the defendants was valid.

The facts proved at the trial before the county court judge on the 12th of February, 1879, may be briefly stated as follows:—

John Prior, a trader, filed a petition for liquidation by arrangement or composition on the 15th of February, 1878. On the 7th of March, 1878, the first meeting of creditors was held. Watson and Garbut were creditors, and had levied an execution which was withdrawn; they were represented at the meeting;

1880

SEYMOUR v. COULSON.

they required a composition of 10*s.* in the pound, and, this proposition not being acceded to, they withdrew their proof: the other creditors resolved to accept 5*s.* in the pound, payable by two instalments within six and twelve months from the date of the second meeting on security. The second meeting was held on the 19th of March, when it was resolved that the joint and the separate notes of the claimants and the debtor should be accepted, and the claimants undertook in writing to secure the composition. The debtor undertook to give the claimants an assignment of his real and personal property, which was in September, 1878, executed and duly registered as a bill of sale. Between the first and second meetings J. Wharton, one of the claimants, and J. Mackieman, a creditor of Prior, went to Watson and Garbut and paid them 10*s.* in the pound on account of the debt due to them, and Wharton, having received their proxy, attended at the second meeting and voted in respect of their debt. It was stated by Wharton that in buying the debt due to Watson and Garbut he and Mackieman acted to the best of their judgment; but he admitted that they had a feeling in favour of the debtor. The debtor denied that he had authorized the purchase of the debt due to Watson and Garbut, but there was some evidence that he knew of it. There was a sufficient statutable majority to carry the resolutions at the first and second meetings, if Watson and Garbut had persisted in their opposition. The plaintiff, Seymour, had obtained judgment against Coulson and John Prior in the county court, and had seized a stack of hay included in the bill of sale: the claimants gave notice that the stack belonged to them: the bailiff sold the stack and paid the proceeds into court. It did not appear that the resolutions for composition had been set aside.

The judge of the county court decided against the claimants. The grounds of his decision were that, under the circumstances, the composition resolutions were void as being based on fraud, namely, a payment made improperly to procure a carrying out of the proceedings initiated by the petition in a different manner from that in which they would without that payment have been carried out; and that, Wharton having been guilty of such fraud, he was bound to treat the other claimants as being in the same position as he was, as the bill of sale could not be void as regarded

Wharton and valid as regarded the other two claimants. He was of opinion that the composition resolutions had never been registered so as to bind the creditors, and that the whole composition and the bill of sale were founded on the fraud and could not stand.

An objection had been raised that the bill of sale was void under 13 Eliz. c. 5 against creditors, but the judge overruled it.

The county court judge was not asked to make any note of any question of law raised at the hearing, or of the facts in evidence in relation thereto, but as a matter of fact he took in shorthand a note of the evidence, and of the various objections to the validity of the bill of sale, with his decision upon them. This note he transcribed and furnished to the claimants on their application after the hearing, but under protest, together with an additional statement in writing of the grounds of his judgment.

1879. May 14. *Cave, Q.C.*, shewed cause, and objected that the county court judge not having been duly requested to take a note of any specific legal point raised before him, the motion could not, under 38 & 39 Vict. c. 50, s. 6 (1) be entertained.

(1) 38 & 39 Vict. c. 50, s. 6: "In any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction or decision of the judge .... to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance. .... And at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall at the expense of any person or persons being party or parties in any such cause, suit, or proceeding requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion, and at the hearing of such appeal."

By Orders of Court, January, 1877, 1. It is ordered that motions under 38 & 39 Vict. c. 50, s. 6, shall be made in the Queen's Bench, Common Pleas, and Exchequer Divisions only upon the days appointed for hearing appeals from inferior Courts, and no such motion shall be made by way of appeal from any county court, unless a copy of the judge's notes, signed by the judge, shall have been handed to the proper officer in court, unless otherwise ordered.

1880

SEYMOUR v. COULSON.

R. V. Williams, in support of the rule, contended that the omission was immaterial, as the note furnished by the judge was sufficient to shew the point raised at the hearing.

Cur. adv. vult.

June 11. THE COURT (Cockburn, C.J., and Mellor, J.), said that, inasmuch as the county court judge was not requested to take a note of any specific objection in point of law made before him, as required by 38 & 39 Vict. c. 50, s. 6, the rule must be discharged.

Rule discharged.

The claimants appealed to the Court of Appeal.

1880. April 6, 8. *Herschell, Q.C.*, and *R. V. Williams*, for the claimants. First, as to the construction of the County Courts Act, 1875, s. 6, although the judge was not requested at the trial to take a note of the point, yet the facts stated by him shew that the judgment proceeded upon questions of law which it is now desired to raise. It is immaterial that no request was made, if the judgment proceeded upon a point of law. No doubt it is obligatory upon the judge to take a note, but the words of the section cannot be construed as enacting that the request to the judge is a condition precedent to the right to appeal. The judgments in *Rhodes* v. *Liverpool Commercial Investment Co.* (1) may seem to countenance the contention that no appeal will lie unless the judge has been requested to take a note; but it is submitted that this view of the law cannot be sustained. (2)

Secondly, as to the merits, it is possible that the resolutions were irregularly passed: *Ex parte Cobb, In re Sedley* (3): but they were only voidable, not void; and in order to render them wholly invalid, they ought to have been set aside. Even if they were void, their invalidity does not affect the bill of sale executed in favour of the claimants, for it was founded upon a valuable consideration which cannot be impeached: the creditors of Prior can rely upon the guarantee signed by the claimants, for they

(1) 4 C. P. D. 425. (2) But see *Pierpoint* v. *Cartwright*, 5 C. P. D. 139.
(3) Law Rep. 8 Ch. 727.

are still liable upon it: *Glegg* v. *Gilbey* (1): and therefore the claimants ought not to be deprived of the benefit of the assignment, which was the consideration for their becoming sureties for the composition.

Cave, Q.C., and *Horace Smith*, for the plaintiff. As to the first point, a party to an action in a county court can only appeal under the County Courts Act, 1875, s. 6, upon a question of law.

[BRETT, L.J. We all are agreed as to that: it is unnecessary to argue it.]

That statute requires that the judge shall be requested during the trial to take a note of the evidence and of the point of law raised upon it: as this was not done, no appeal will lie. It was not intended that where a party had failed at the trial to call attention to a mistake of law, he should afterwards have an opportunity of getting the decision set aside.

As to the second point, the bill of sale was void under 13 Eliz. c. 5, and cannot be upheld. The resolutions for composition were invalid: *Ex parte Cobb, In re Sedley* (2); and this is a further ground for setting aside the bill of sale.

Herschell, Q.C., was not heard in reply.

BRETT, L.J. In my opinion we are bound to take it that the judge of the county court has sent to the High Court a note of all the evidence given at the trial in the county court: it has not been alleged that any material point has been omitted: and we must assume that all the necessary facts have been stated. The evidence stands thus: it was desired that the debtor should enter into a composition, and the claimant Wharton bought the debt of creditors about to object to the resolutions: there was some evidence of knowledge on the part of the debtor and of assent on his part to this transaction: the proxy of the creditors was used by the purchaser in passing the resolutions: those resolutions were passed: there was evidence that the claimants undertook to secure the payment of composition upon an agreement by the debtor, that he should give them a bill of sale: it seems that the judge of the county court believed this evidence, and that the bill of sale was executed in consideration of the claimants making them-

(1) 2 Q. B. D. 209. (2) Law Rep. 8 Ch. 727.

1880

SEYMOUR v. COULSON.

selves liable for payment of the composition: he believed, however, that the debtor had connived at the sale of the debt, and that the resolutions had been improperly arrived at, and upon the authority of a decision in the Court of Appeal, *Ex parte Cobb, In re Sedley* (1), he held the resolutions void, or at least voidable: he further held that the bill of sale was void in point of law. I agree that the points decided by the judge of the county court were that the bill was not void by the Statute of Elizabeth, and that the resolutions were bad, as being in fraud of the bankruptcy law; but the point was not taken that the bill of sale could not be impeached, the resolutions being not void but only voidable and not having been set aside. The judge of the county court decided, as a matter of law, that the bill of sale was void. The claimants have appealed, not under the provisions of the County Courts Act, 1850, but under the County Courts Act, 1875, s. 6. The decision of the Queen's Bench Division proceeded upon this ground, namely, that although the judge had decided questions of law, yet the appeal must fail because the judge was not asked at the trial to take a note of the evidence and of the point of law and of his decision thereon. The Queen's Bench Division decided upon a preliminary point, and they were of opinion that upon the true construction of the statute the request to the judge is a condition precedent to the right of appeal. I do not think that the request is a condition precedent; the language is not consistent with that construction. Sect. 6 gives a new form of procedure upon appeal, instead of that which had previously existed and had been found inconvenient. [The Lord Justice read the commencement of s. 6.] It gives no new right of appeal as to the subject-matter, no right of appeal as to facts. It only enacts that the procedure need not be by special case; the section is not in the form of a proviso or of a condition precedent. The enactment is in favour of the party who appeals, and for his benefit, and in order that he may appeal under favourable circumstances; in some cases the judge may think that the point is not of sufficient importance to warrant an appeal, and may not take a note; and the statute has provided that the judge shall take a note upon application. Therefore, the request is not

(1) Law Rep. 8 Ch. 727.

a condition precedent. We are not called upon to decide what may be the effect in a case where no note has been taken, and no request has been made to the judge to take it, or where the judge has been requested to take a note and has failed to do so; because in the present case the judge has sent a full note with a statement of the points of law, which were decided by the judge at the trial, at least in his own mind. When the judge has not been requested to take a note, we do not decide whether an appeal lies if he has decided more than one point of law and the evidence raises several. If the judge does decide all the points of law and states the evidence, it is sufficient to enable the party dissatisfied with the decision to appeal. No valid reason has been adduced why this appeal should not be entertained.

I now proceed as to the question of merits, and as to these the judge in my opinion has been wrong in point of law. The resolutions for composition have been improperly arrived at, and according to the case which has been cited, are voidable; but they have not been set aside; and it is unnecessary to decide what is the consequence of the omission to do so: and the reason is that they had no effect upon the bill of sale: that was founded upon a valid consideration and was sufficient to pass the property in the goods to the claimants.

The judge decided the question wrongly, and the appeal must be allowed.

COTTON, L.J. The claimants argued that the judgment of the county court judge was wrong. The Queen's Bench Division were of opinion that the claimants had not done what was necessary to entitle them to be heard, and that Court dismissed the appeal, upon the ground that the judge of the county court had not had the points of law raised before him. I think that the dismissal of the appeal was erroneous. By the County Courts Act, 1875, s. 6, a new right of appeal was not given: the statute assumes that the right of appeal already existed, it merely creates a particular mode of appeal as to questions of law. Does the section make the request to the judge to take a note a condition precedent to the right to appeal? In my opinion it does not: it merely renders it obligatory upon the judge to take a note at the

1880

SEYMOUR v. COULSON.

request of either party. The right of appeal is not restricted: it is enough if the point of law appears to have been raised at the trial before the judge of the county court; and it is sufficiently raised, if the judge necessarily decided it in order to arrive at a conclusion. The view of this Court does not extend to those cases where the question of law does not appear upon the judge's note: I give no opinion as to such a case as that: it may be necessary there to proceed by special case. Further, I say nothing as to an appeal where it is shewn that, by the omission to request that a note may be taken, evidence material to the point of law raised upon the rule has not been given. In the present case it appears that all the material facts have been stated by the judge.

It may be that the resolutions were obtained by what was technically a fraud; but I give no opinion, whether the judge of the county court was justified in holding that the resolutions were void or rather voidable in consequence of the purchase of the dissenting creditors' debt. The resolutions remained uncancelled: possibly they might be set aside; but even if they could be impeached, it does not follow that the bill of sale was void; the invalidity of the resolutions is no ground for treating the bill of sale as a nullity. The decision of the judge of the county court was erroneous. It is unfortunate that the judges in the Queen's Bench Division did not consider the main point in the case.

THESIGER, L.J. Two questions arise for our consideration: first, whether it is competent to the claimants to appeal upon the notes taken by the judge of the county court: secondly, whether the decision upon the merits is right.

As to the first question I think that we are bound to hold that the appeal is in point of form maintainable. The right of appeal was given by the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14, to a party to a cause who should "be dissatisfied with the determination or direction of the said Court in point of law." Under that statute it was necessary to proceed by special case; and occasionally a difficulty was interposed in the way of the appellant from the circumstance, that an imperfect note had been taken by the judge during the trial. In order to remedy this inconvenience, a new kind of procedure was introduced by the

County Courts Act, 1875, s. 6. Under that section a person having a right to appeal and who is "aggrieved by the ruling, order, direction, or decision of the judge," is empowered to appeal by motion. Primâ facie, he would be entitled to move as in ordinary cases in the High Court, upon counsel's briefs and notes and the ordinary materials used upon such motions; but the legislature probably thought it advisable to provide for those cases in which there might be contradictions as to the questions raised or the evidence given before the county court judge, and in order that the Court might have an accurate note of the questions and evidence, provided that the party intending to dispute his decision might request the judge to take a note of the evidence and of his determination thereon, and that a copy of the note should be prepared at the expense of the party requiring it. It seems to me that all these provisions are intended for the benefit of the party intending to appeal by motion, and do not constitute a condition precedent to his right to appeal. It is unnecessary to decide how matters would have stood, if no note had been taken: but here a note exists upon which the facts are fully stated, and the Court can ascertain from it what evidence was given and what questions were raised at the trial. It would defeat the purposes of the statute, if we were to refuse to hear the appeal merely because during the trial no request was made to the judge to take a note.

The second question, which goes to the merits of the case, may be briefly disposed of. An objection appears to have been raised to the bill of sale, that it was void under 13 Eliz.: but the judge in effect decided that it was not a sham; it was founded upon a good consideration, and therefore, notwithstanding that statute, it remains effective. There is no ground for impeaching it under the provisions of that Act. It has been argued also that the resolutions for composition were invalid, because the debt due to certain creditors was bought and the claimants were actuated by a feeling of good will towards the debtor, and *Ex parte Cobb, In re Sedley* (1), was cited in support of the contention; but it seems to me that the resolutions were only voidable, and do not become wholly inoperative until they have been set aside, and even if

(1) Law Rep. 8 Ch. 727.

1880

SEYMOUR v. COULSON.

they are set aside, the bill of sale may stand good, because it is founded upon a valuable consideration and is not immediately connected with the resolutions.

Appeal allowed.

Solicitors for plaintiff: *Chester & Co.*

Solicitors for claimants: *Williamson, Hill, & Co., for George Webster, Darlington.*

March 24.

[IN THE COURT OF APPEAL.]

COLLINS *v.* THE VESTRY OF PADDINGTON.

Practice—Appeal—Interlocutory Order or Judgment—Case stated by Arbitrator for Opinion of High Court—Extension of Time for appealing—Rules of Supreme Court, 1875, *Order LVIII., rules* 4, 15.

The decision of the High Court upon a special case stated for its opinion by an arbitrator, who is thereupon to make his award, is an "interlocutory order" within the meaning of Rules of the Supreme Court, Order LVIII., rule 15, and an appeal from the decision must be brought within twenty-one days.

An arbitrator, to whom an action had been referred, stated a special case as to a question of damages for the opinion of the Queen's Bench Division: judgment was given upon the 1st of April, for the defendants. A few days after the plaintiff's solicitor wrote both to the arbitrator and to the defendants' solicitor, stating that an appeal would be brought: on the 18th he had an attack of illness which incapacitated him from attending to business until the 25th: he was informed by counsel on the 26th that it was then too late to set down the appeal as from an interlocutory order; and accordingly on the 12th of May, he gave a fourteen days' notice of appeal as from a final order of judgment. At the hearing on the 23rd of February following, an objection was taken that the decision of the Queen's Bench Division was an interlocutory order or judgment, and that the appeal not having been brought within twenty-one days was too late: the objection having been allowed, the plaintiff then moved for an extension of time for appealing:—

Held, that the application ought not to be granted.

In re West Jewell Tin Mining Company, Little's Case (8 Ch. D. 806) distinguished.

By Baggallay and Thesiger, L.JJ., that although before judgment applications for extension of time should be freely granted, yet after judgment applications of that kind ought to be allowed only with caution.

By Bramwell, L.J., that an application for extension of time ought to be granted at any stage of an action, whenever an unintentional mistake has been committed, and the damage to the opposite party may be repaired by payment of costs or otherwise.

ACTION for breach of contract.

At the trial before Pollock, B., the action was referred to

1880

COLLINS v. VESTRY OF PADDINGTON.

a barrister, and the order of reference directed that he should have power to state a case for the opinion of the Court on any point that might arise at the instance of either party. Both parties having by their counsel, before the hearing began, requested the arbitrator to refer to the Court the question hereafter mentioned, he stated a special case.

For the purposes of the present report, it is only necessary to say that the special case set out a contract, whereby the defendants sold to the plaintiff all the dust, cinders, and refuse, which should during the period of twelve calendar months from the 25th of March, 1876, be collected by the defendants from the houses within the parish of Paddington, and whereby the defendants covenanted with the plaintiff to deliver and deposit the dust, cinders, and refuse upon a brickfield belonging to the plaintiff: that the dust, cinders, and refuse were collected by the servants of the defendants at the dust-bins of the houses: that the contents of the dust-bins consisted chiefly of cinders and ashes and the sweepings of the houses, but they also contained a number of articles thrown into them as refuse by the occupiers of the houses, and known as "tots:" that these articles were saleable, and amongst the most valuable were glass, bones, articles of iron, lead, and other metals, and knife-handles: that these "tots" were abstracted by the servants of the defendants.

The special case concluded as follows: "The question for the opinion of the Court is whether the plaintiff is entitled to damages for the abstraction under the circumstances mentioned of 'tots' by the servants of the" defendants.

The action embraced other matters than those mentioned in the special case.

The Queen's Bench Division upon the 1st of April, 1879, gave judgment for the defendants upon the special case stated by the arbitrator. Upon the 12th of May, the plaintiff gave a fourteen days' notice of appeal to the Court of Appeal.

1880. Feb. 23. *W. G. Harrison, Q.C.* (*Julian Robins,* with him), for the defendants. A preliminary objection exists to the hearing of this appeal: the judgment of the Queen's Bench Division was merely interlocutory, for the case must go back to

1880

COLLINS v. VESTRY OF PADDINGTON.

the arbitrator in order that he may make his award and assess the damages, which may be due to the plaintiff in respect of causes of action other than those mentioned in the special case; and the appeal to this Court has not been brought within twenty-one days from the judgment of the Queen's Bench Division, as is required by the Rules of the Supreme Court, 1875, Order LVIII., rule 15.

D. Seymour, Q.C., and *Bompas, Q.C.* (*Croome*, with them), were called upon to argue for the plaintiff. First, the special case is completely disposed of by the decision of the Queen's Bench Division: the judgment of that Court was final upon the rights of the parties as to the question submitted for its consideration: the reasoning of the Lords Justices in *Standard Discount Company* v. *La Grange* (1) shews that the judgment was not interlocutory.

[BAGGALLAY, L.J. That case shews that where any further step is necessary to perfect an order or judgment, it is not final but interlocutory: its principle applies here; the case must go back to the arbitrator that he may make his award: the judgment of the Queen's Bench Division is not the final step in the cause. Does not the very form of the question put by the arbitrator shew that the judgment must be interlocutory?

THESIGER, L.J. In *McAndrew* v. *Barker* (2) an appeal was brought upon an order in an interpleader issue, but as the notice of appeal was given more than twenty-one days after the order was made, it was held to be too late. That was a much stronger case than the present, for the order practically disposed of the question in dispute, whereas here the special case must go back to the arbitrator to make his award.]

An order overruling a demurrer is not an interlocutory order: *Trowell* v. *Shenton*. (3)

[BRAMWELL, L.J. Judgment upon a demurrer is final as to the question of law involved in it: it assumes that the allegations of fact are true.]

Secondly, even if the decision of the Queen's Bench Division is interlocutory, it is nevertheless a judgment: as regards the time for appealing the distinction is between "judgment" and "order."

(1) 3 C. P. D. 67. (2) 7 Ch. D. 701.
(3) 8 Ch. D. 318.

By Rules of the Supreme Court, 1875, Order LVIII., rule 4, "notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice." By rule 15, "no appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year." The judgment of the Queen's Bench Division is not an "interlocutory order" within the first clause of rule 15, and therefore an appeal from it falls within the second clause, and may be brought at any time within a year. The plaintiff has given a fourteen days' notice of appeal as is required by rule 4, in the case of every judgment, whether final or interlocutory.

[BRAMWELL, L.J. This is the first occasion upon which I have heard it contended, that as regards rule 15 a distinction exists between interlocutory orders and interlocutory judgments.]

The distinction between an order made in the course of an action and the judgment determining the questions at issue is convenient to be observed.

BRAMWELL, L.J. This appeal has been brought too late: if we were to hold that it is in time, we should overrule former decisions of this Court. In order to enable the plaintiff to apply upon proper materials for an extension of the time for appealing, we will reserve judgment sine die.

BAGGALLAY and THESIGER, L.JJ., concurred.

The plaintiff on the 6th of March gave notice of motion for special leave to appeal against the judgment of the Queen's Bench Division.

March 11. *Bompas, Q.C.* (*Croome,* with him), for the plaintiff. *W. G. Harrison, Q.C.* (*Julian Robins,* with him), for the defendants.

The counsel for the plaintiff in support of his argument relied upon an affidavit of Mr. Macmullen, the plaintiff's solicitor, as explaining the causes of the delay in bringing the appeal: the

1880

COLLINS v. VESTRY OF PADDINGTON.

contents of the affidavit are sufficiently stated and commented upon in the judgment of Baggallay, L.J., hereafter set out.

The following cases were cited in the course of the argument: *In re Ambrose Lake Tin & Copper Company, Taylor's Case* (1); *In re West Jewell Tin Mining Company, Little's Case* (2); *Craig* v. *Philips* (3); *McAndrew* v. *Barker.* (4)

Cur. adv. vult.

March 24. The following judgments were delivered:—

BAGGALLAY, L.J. This is an application by the plaintiff under the 15th rule of Order LVIII., for an extension of the time for appealing from an order made by the Queen's Bench Division on the 1st of April, 1879. Notice of appeal having been given on the 12th of May, it was treated as an appeal from a final order, and came on for hearing on the 23rd of February in the present year. An objection was then taken that the order appealed from was an interlocutory order, and that the time within which the appeal could be brought had expired before the notice was given. The objection was allowed, but leave was given to the plaintiff to move for an extension of the time for appealing. He accordingly moved on the 11th inst., and in support of his motion relied upon an affidavit sworn by his solicitor, Mr. Macmullen, on the 6th inst. The affidavit so sworn contained statements to the effect that, immediately after the judgment given on the 1st of April, the plaintiff determined to appeal, and that, in accordance with his instructions, the following letters were sent by Mr. Macmullen to Mr. Wills, to whom the action had been referred, and to the defendants' solicitor. The letter to Mr. Wills was dated the 3rd of April, and so far as material was as follows: "The Court having decided this case in favour of the defendants, I am instructed by my client, Mr. Collins, the plaintiff herein, to inform you that it is his intention to appeal from the decision to the Court of Appeal. You will, therefore, be good enough not to let your award herein go from you until after the decision of such appeal." The letter to the defendants' solicitor was dated the 4th of April, and was as follows: "Please say by return of post whether or not it is your

(1) 8 Ch. D. 643.
(2) 8 Ch. D. 806.
(3) 7 Ch. D. 249.
(4) 7 Ch. D. 701.

intention to draw up the judgment herein on the special case, and when? for on default of your doing so forthwith, and serving me with a copy as soon as practicable—say on or before Tuesday next—I shall proceed to draw up such judgment, as I hereby give you formal notice by and on behalf of my client, the plaintiff herein, that it is his intention to appeal as soon as practicable against such judgment." These two letters were, in terms, distinct intimations of the plaintiff's intention to appeal; but whether, at the time when the letter of the 4th was written, it was intended as a notice of appeal or only as a threat, may be doubted. There follow statements in the affidavit to the following effect, that on the 8th of April the plaintiff's solicitor received from the defendants' solicitor a copy of the order made on the 1st, and at once prepared to set down the appeal, having determined, in order to avoid any question, to treat the order as interlocutory, but believing that he had twenty-one days from the 8th within which to set it down; that on the 18th he had an attack of gout which incapacitated him for business until the 25th; that had it not been for his illness he should have set down the appeal on the 19th or 21st, the 20th being a Sunday; that on the 25th he was for the first time well enough to see the plaintiff and obtain his further instructions, and that on that day he was instructed by the plaintiff to set down the appeal at once; that on the following day, the 26th, he saw his counsel, who informed him that the time for appealing ran from the 1st and not from the 8th, and that it was consequently too late to set down the appeal as from an interlocutory order; and that, in accordance with the advice of counsel, he gave the notice of the 12th of May, and set down the appeal as an appeal from a final order.

The statements so made by Mr. Macmullen in his affidavit are in my opinion very unsatisfactory.

The first question that suggests itself is, why, if the letter of the 4th of April was intended as a notice of appeal, was it not acted upon by setting down the appeal between that date and the 18th; the omission to do so is inconsistent with the extreme urgency of the language of the letter, that there might be no delay in drawing up the order and thus putting the plaintiff in a position to appeal. The counsel for the plaintiff has relied upon

1880

COLLINS v. VESTRY OF PADDINGTON.

Little's Case (1), as one in which the Court of Appeal held that a notice of an intention to appeal should be treated as a notice of appeal; but, in that case, application was made to the registrar in due time to set down the appeal, and it was in consequence of his declining to do so, on the ground that the notice was not a notice of appeal, but only of an intention to appeal, that the matter was brought before the Court of Appeal and the order then made was an order, not to extend the time for appealing, but to set down the appeal upon the footing that a sufficient notice had been given. Again, Mr. Macmullen has stated in his affidavit that he should have set down the appeal on the 19th or 21st of April, had he not been prevented by illness; if he had done so, it would have been within twenty-one days from the 1st: but it is difficult to understand how it is that that gentleman can now make the positive assertion that but for his illness he would have set down the appeal on the 19th or 21st, when he had already let ten days go by without doing anything, and was still under the impression that he would not be out of time until the 29th, and it is even more difficult to understand why, if Mr. Macmullen had received his instructions to proceed with the appeal before his illness, and, but for such illness, would have set it down on the 19th or 21st, he deemed it necessary on the 25th to seek for and obtain instructions from his client for setting it down, in other words, for doing that which he had already received instructions to do. When considering the effect to be attributed to this affidavit, it is impossible to forget that Mr. Macmullen, when preparing it, was, by reason of the previous discussion in court, well aware of the difficulties that he had to surmount in order to obtain for the plaintiff relief from the consequences of the mistakes, which he, the deponent, undoubtedly committed. His mistake in treating the order as final instead of interlocutory was not of itself sufficient to support the application, and he was consequently driven to fall back upon the suggestion that the letter of the 4th of April was a sufficient notice of appeal from the interlocutory order of the 1st, and had been given in due time; but here again he was met with the difficulty that, even if that letter could be treated as a notice duly given, the appeal had not been set down

(1) 8 Ch. D. 806.

in time; ignorance of the fact that according to the recognised practice the twenty-days should be reckoned from the 1st instead of from the 8th could in no way assist him, and we accordingly have the case suggested that an intended setting down on the 19th or 21st, which would have been in good time, was prevented by illness. I have already pointed out how unsatisfactory are the statements of Mr. Macmullen upon the suggestion so made.

But in addition to these difficulties in the way of the appellant, there is the further, and, as it appears to me, insuperable difficulty, that when Mr. Macmullen found that, owing partly to his original mistake and partly to his illness, he had let the twenty-one days go by, he did not at once apply for an extension of time to appeal from the order, which, up to that time, he had been treating as interlocutory, but endeavoured to prosecute the appeal as one from a final order. In my opinion the application must be refused.

The opinion, which I have thus expressed, is I believe concurred in by the other members of the Court, and I should not have deemed it necessary to make any observations as to the general principles upon which the Court of Appeal has been in the habit of acting, when dealing with similar applications, had it not been that Bramwell, L.J., has intimated to me that the present is, in his opinion, a convenient opportunity for him to express his views upon that subject. He has allowed me to see the memorandum, which he proposes presently to read, and, as I am unable to concur in all that he has written, I propose to point out, as concisely as the subject will permit, wherein my views differ from his. In the memorandum, to which I have referred, the Lord Justice has enunciated the rule upon which, during his long experience at chambers, he invariably acted, when dealing with applications for an extension of time for doing or taking any act or proceeding in the course of an action. From the rule so enunciated I should express no dissent, if its operation were limited to applications for an extension of time made previously to the trial or hearing of the action; but there is, in my opinion, a great distinction, greater, I think, than the Lord Justice recognises, between applications for an extension of time in cases such as those to which I have referred, and applications to extend the

1880

COLLINS v. VESTRY OF PADDINGTON.

time for appealing after the action has been tried and judgment given. Such a distinction was recognised before the Judicature Acts came into operation as well in Courts of Common Law as in the Court of Chancery. Speaking from my own experience of the practice in the latter, I can state that the enrolment of a decree could not be vacated on the ground of mistake or oversight, nor, as it was put by Lord Chelmsford in *Wildman* v. *Lade* (1), except upon strong grounds of surprise or something approaching deception or mala fides. I cannot rely upon any similar experience of the practice in Courts of Common Law, but I believe that I am correct in stating that the general rule of 1853, which provided that no motion for a new trial or for other object of a similar character, should be allowed after the expiration of four days, was rigidly enforced except under very particular circumstances, and that the exceptions were of rare occurrence.

And the same distinction is recognised and maintained by the rules, which are now in force under the Judicature Acts. The several rules contained in the Orders numbered I. to LVII., as scheduled to the Act of 1875, have reference to acts and proceedings in an action from its commencement to judgment, including any proceedings that may be necessary for giving effect to a judgment; and the 6th rule of the last of these orders provides, in general terms, that a Court or a judge shall have power to enlarge the time appointed for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require. Provision having thus been made for regulating the acts and proceedings during the progress of an action, the several rules of Order LVIII. regulate the proceedings connected with appeals to the Court of Appeal as distinguished from appeals from a master to a judge, or from a judge to a Divisional Court, or other appeals of a similar kind. By the 15th rule of this order the times, within which appeals may be brought, are limited in peremptory terms. The rule provides that no appeal shall, except by special leave of the Court of Appeal, be brought after the expiration of the times therein mentioned. The contrast between the affirmative language of the 6th rule of Order LVII. and the negative language of the 15th rule of Order LVIII., ought

(1) 4 De G. & J. 401.

not, in my opinion, to be disregarded. Nor has it been disregarded by the Court of Appeal, in the cases which have come under its consideration. It is unnecessary to refer to them in detail; it is sufficient to say of them that they illustrate the principle, upon which the Court of Appeal has acted, and the nature of the discretion which it has exercised in granting or refusing the indulgence when it has been applied for; I use the term "indulgence," as it appears to me that the granting of an extension of the time for appealing is an indulgence, and should be treated as such, though Bramwell, L.J., would prefer to treat it as ex debito justitiæ. The principles, upon which the Court of Appeal has acted, if they are estimated by the way in which they have been applied, are, in my opinion, in accordance with the spirit of the provisions of the rules, though an expression may have occasionally fallen from a judge, when refusing an application, which, read by itself, and unconnected with the circumstances of the case or with the arguments which may have been addressed to him, may appear to confine the classes of cases in which the indulgence may be properly granted within too narrow limits. The Lord Justice states as the obvious reason for the rule which he adopted in chambers, that it was to do justice between the parties and to bring about the result that the litigant should succeed according to the goodness of his case and not according to the blunders of his adversary, and that it is for those who impugn it to say why. The former object of doing justice between the parties is one which I hope and believe all judges have in view whatever may be the rule by which they regulate their practice: the latter, highly important as it is in theory, and to a very great extent in practice also, must of necessity be subjected to certain limits, though the fixing of those limits may in many cases be a matter of considerable difficulty.

The test which the Lord Justice would apply is this: has the mistake or carelessness of the applicant or his advisers been real and unintentional, and can any damage which may be occasioned to the respondent by granting the indulgence be repaired by costs or otherwise? If so, grant it; if not, refuse it. This test is a good one, as I have already intimated, if applied to proceedings in the action, but it is one which, in many cases would be very difficult,

1880

COLLINS v. VESTRY OF PADDINGTON.

and in some impossible, of application after the action has been tried. If such a test were adopted, how great would be the temptation to those who have been negligent to endeavour to conceal their negligence under a plea of illness, or accident, or even of ignorance of the law, which it was their duty to know; and how difficult would be the task imposed upon the respondent of ascertaining whether the excuses so urged are real or well founded. The case which we have had under our consideration, suggests, if it does not illustrate, such considerations as these, to which I have alluded. Again, how impossible it would be in many cases for a respondent to prove the damage, which would be occasioned to him by an extension of the time for his adversary to appeal, though it might be reasonably probable that substantial damage would be sustained by him and especially in cases in which he has been the defendant in the action. But over and above these considerations, we must bear in mind the additional anxiety that must of necessity be occasioned to a successful litigant, if he is left under the apprehension for an indefinite period, that he may be again put to defend the right, which he has once established, upon some allegation of unintentional mistake or carelessness on the part of his adversary or of his adversary's solicitor.

It is unnecessary for me to pursue these observations further; others of a similar character will readily suggest themselves to those who consider the question in all its bearings; but, having regard to the terms of the memorandum, which the Lord Justice is about to read, and which cannot be regarded otherwise than as intimating a dissent from the views hitherto acted upon by the Court of Appeal, I have thought it right to express my own conviction of the propriety of its decisions.

BRAMWELL, L.J. I entirely agree in the opinion of Baggallay, L.J., that this application should be refused, but do so for the reasons which he has shown as to the particular case and not on the general considerations presented to us by Mr. Harrison. I could not do so without admitting a long period of mistake in myself as well as, I believe, in my brethren of the bench. I would admit that mistake, if I believed it existed: but I do not.

I believe our practice was right, and that I ought to say so and why.

During the twenty years I attended at judges' chambers, when I had to deal with applications for an extension of time to do anything required in the course of an action, or to set aside a judgment or other step taken, and with other applications which are applications to the indulgence of the Court, the necessity or occasion of them arising from the mistake, error, or carelessness of the applicant, I acted on the following rule:—If the mistake, error, or carelessness of the applicant, had been real and unintentional, and no damage had been done to the other side that could not be repaired by payment of costs or otherwise, I granted the indulgence as it is called, erroneously so called, as I think, for it seems to me a right, a thing ex debito justitiæ. If I believed the occasion for the application to have been wilful or malâ fide, or the application itself to be, or that to alter the state of things would be, irreparable hurt to the other side, I refused the application. I state this as showing the principle of my rule; to state the practice with all its qualifications and exceptions, and to its full extent would require pages. This rule I cite, not because it has my authority only, though after the thousands of cases in which I have applied it, even that might be of some value, but because I never knew it dissented from by the Courts to which an appeal from its application might have been made. The reason of it to my mind is obvious: it is to do justice between the parties; it is to bring about the result that the litigant succeeds according to the goodness of his cause and not according to the blunders of his adversary. It seems to me that nothing more need be said in its favour; it is for those who impugn it to say why. But this further may be said that by an opposite practice the penalty for blundering depends not on the amount of the blunder, but the amount at stake in the case. It may be right to punish a blunder, but do not punish it with a 50*l.* fine, if that is the amount in dispute, and at the same time punish the same blunder with a 5000*l.* fine, if that is the amount.

Now, what are the reasons the other way? It is said that the other side has a vested right in the benefit of the mistake. Be it so. But his vested right is also a defeasible one, namely, on the

1880

COLLINS v. VESTRY OF PADDINGTON.

Court being satisfied that relief ought to be granted. And it may well be asked why is the power to grant relief given, unless it is to be exercised? As to saying it is to be granted in the case of accident, as where a man is too late, or because his train is, or a solicitor's clerk falls down in a fit, why is this the limit? Why is there a greater right in the result of the litigant's blunder than in that of his misfortune? The solicitor's clerk has a fit: give relief. The solicitor's clerk absconds with the fee: what then? He is not the applicant, it is the suitor who is. Is not the case the same in either event? He has had the misfortune to employ a solicitor whose clerk had a fit (and to use mercantile language) $\frac{\text{and}}{\text{or}}$ absconded, and so judgment was signed against him. It is said that if this principle prevailed there would be no rule. That is equivalent to saying that there is no rule, whenever there is an exception. The rule would prevail; it would be the rule. The applicant would have to bring himself within the exception and pay the appropriate penalty of costs.

I fully admit there is a difference between strictly interlocutory proceedings such as pleading, and an appeal, and I admit that the Judicature Rules seem to recognise that difference. But in my opinion that rule I have mentioned is the one that would govern in such cases, though it should be applied with more strictness and severity. It is more painful and disappointing to a litigant, who thought his case ended to have it opened, than it is to one who knew it was going on to find he has lost some advantage from a slip. Still the governing principle should be the same, and I doubt very much whether I and the Lord Justice would differ in its application.

THESIGER, L.J. I agree that this application must be refused. I should add nothing to what has fallen from Baggallay, L.J., if it were not for the observations of Bramwell, L.J.; these observations carry great weight, and as I am unable to concur in them to their full extent, I wish to point out how far I dissent from them.

I agree that until a judgment has been arrived at upon the merits, an extension of time may be allowed for rectifying a mistake or oversight. Up to that time both parties may be

considered as standing upon an equal footing: the questions between them are still open, and it is doubtful which of their opposing contentions is correct: each party has a right to have the dispute determined upon the merits, and Courts should do everything to favour the fair trial of the questions between them. Blunders must take place from time to time, and it is unjust to hold that because a blunder during interlocutory proceedings has been committed, the party blundering is to incur the penalty of not having the dispute between him and his adversary determined upon the merits. All such cases of blunder may be remedied by payment of costs or the imposition of terms and conditions. But after judgment has been entered upon the merits, different considerations arise, the litigants are no longer upon an equal footing: the question in dispute is not open, for the decision of a competent tribunal has passed in favour of one party, and it must be presumed that the decision is right. In the interest of the public the Court ought to take care that appeals are brought before it in proper time, and as between the parties it has been often remarked, in the branch of this Court which sits at Lincoln's Inn, that when a judgment has been pronounced, and the time for appeal has elapsed without appeal, the successful party has a vested right to the judgment, which ought, except under very special circumstances, to be made effectual. And I think that the legislature intended that appeals from judgments should be brought within the prescribed time, and that no extension of time should be granted except under very special circumstances. The practice in chambers prior to the Judicature Acts, to which Bramwell, L.J., has alluded, related to interlocutory proceedings; but in regard to motions for a new trial or to enter a verdict, and appeals under the Common Law Procedure Act, 1854, the practice as to refusing extension of time was stringent. The Judicature Acts and Rules seem to recognise the distinction I have referred to. It is unnecessary for me to comment in detail upon the rules annexed to the Act of 1875: for their effect has been pointed out by Baggallay, L.J.: I gather from them that before judgment on the merits every reasonable relaxation should be allowed, but that after judgment no relaxation should be granted except for very special reasons. There may be some judicial expressions not quite

1880

COLLINS v. VESTRY OF PADDINGTON.

consistent with the view that I have taken; but the course of practice has been in favour of it, and, in my opinion, the remarks of Bramwell, L.J., do not sufficiently distinguish between proceedings before and after judgment.

Appeal dismissed.

Solicitor for plaintiff: *R. H. Bristow Macmullen.*
Solicitor for defendants: *J. H. Hortin.*

May 13.

THE QUEEN *v.* MAY AND OTHERS, JUSTICES OF ESSEX.

Bastardy—Appeal—Order of Quarter Sessions when final—Hearing in absence of Respondent—Decision "on Merits."

Upon the hearing of an appeal to quarter sessions against an order of affiliation, it appeared that the respondent and her witnesses were not present, having mistaken the day of hearing, and her counsel applied for an adjournment till the following morning, offering to pay the costs of the day. The appellant having declined to accede to this proposal, the sessions directed the case to proceed, and quashed the order, no evidence having been adduced on the part of the respondent:—

Held, that the order of quarter sessions was not a decision upon the merits, and that fresh proceedings in respect of the same matter might be taken before justices.

RULE calling upon G. P. May, Esq., and other justices of the petty sessional division of Dengie, Essex, and Ellen Phillips, to shew cause why a writ of prohibition should not issue, to prohibit them from further proceeding upon a summons issued by the said G. P. May against James Frost, whereby Ellen Phillips alleged that Frost was the father of her illegitimate child.

It appeared from the affidavits that Ellen Phillips, having been delivered of a bastard child, a summons was taken out against Frost, and an order affiliating the child on him was made by the justices in petty sessions on the 25th of October, 1879, after a full hearing on the merits. Frost thereupon gave notice of appeal to the next January quarter sessions. The appeal came on for hearing at Chelmsford, on the 7th of January, 1880, when the appellant and his counsel attended. The respondent did not attend, but her counsel applied to the Court to postpone the

hearing till the following day, on the ground that she had mistaken the day of hearing, and had discovered her mistake when it was too late to attend, owing to the fact that she resided twenty-four miles from Chelmsford. The appellant opposed this application, though the respondent's counsel offered to pay the costs of the day, and the case having been proceeded with no evidence was adduced by the respondent, and the order was quashed.

On the 6th of March, Ellen Phillips took out another summons before justices in respect of the same child, and at the hearing it was agreed that the matter should stand over to abide the result of the present rule.

W. Wightman Wood, shewed cause. *Reg.* v. *Glynne* (1) has decided that where on appeal to sessions against a bastardy order the order is quashed upon the merits, the mother cannot renew her application before the justices in petty sessions. But here there was no decision on the merits, for judgment was given in the absence of the respondent.

[LUSH, J. Where the petty sessions dismiss the application the dismissal is in the nature of a nonsuit, and a fresh application may be made, but here there is an order quashed upon appeal.]

The appeal is practically a rehearing. In *Rex* v. *Jenkin* (2) where it was held that justices in petty sessions could not make a dismissal by them final by drawing up an order acquitting the defendant, it is assumed that the decisions in *Slater's Case* (3), *Pridgeon's Case* (4), and *Rex* v. *Tenant* (5), shew that orders of sessions upon appeal in bastardy are final. But upon reference to these cases it will be seen that in each of them the order quashing the decision of the justices had been after a hearing on the merits. In *Rex* v. *Tenant* (5), there was a "full hearing of the merits." In *Pridgeon's Case* (4) the sessions, besides quashing the order, had charged another person, which shews that they went into the merits. *Ex parte Harrison* (6) is an instance of a second application being entertained after a previous order

(1) Law Rep. 7 Q. B. 16.
(2) Cas. K. B. t. Hardw. 301.
(3) Cro. Car. 470.
(4) Cro. Car. 341, 350.
(5) 2 Ld. Raym. 1423; 2 Str. 716.
(6) 16 Jur. 726.

1880

THE QUEEN v. MAY.

had been quashed, but not on the merits: see note to *Reg.* v. *Glynne.* (1)

Secondly, *Reg.* v. *Bridgman* (2), shews that this application for a prohibition is premature, and that the justices ought to be allowed to commence the hearing of the case, when the objections now made may be taken: *Reg.* v. *Robinson* (3) is to the same effect.

C. E. Jones, in support of the rule. The sessions, in the exercise of their discretion, refused to adjourn the hearing of the appeal, and it must therefore be taken that it was determined upon the merits. *Reg.* v. *Glynne* (4) is in point. There the sessions quashed the order on the ground that the corroborative evidence was insufficient. Here no evidence was adduced, and no sufficient excuse was given for the absence of the evidence.

[He further contended that having regard to the fact that the costs of the appeal to sessions had never been paid by the respondent, the Court would not allow her to commence fresh proceedings against the appellant.]

LUSH, J. This question is one of considerable nicety, and I have had some hesitation as to the decision which we ought to give, but I have come to the conclusion that a prohibition ought not to be allowed, and that this rule should be discharged. It is well established that where the petty sessions have dismissed an application for a bastardy order the mother is at liberty to apply again for an order, the reason being as explained in *Rex* v. *Jenkin* (5), that the statute contains no provision as to the form of the order dismissing the application, and gives no appeal from it. But where an order of affiliation is made, the statute gives the putative father power to appeal to the quarter sessions, and by expressly prohibiting the sessions from confirming the order, unless the mother produces corroborative evidence, has evidently contemplated that upon the appeal the whole matter shall be gone into on the merits. This has been the law for centuries, and after the quarter sessions have gone into the merits their

(1) Law Rep. 7 Q. B. 18.
(2) 15 L. J. (M.C.) 44.
(3) 6 D. & L. 295; S. C. *Reg.* v. *Justices of Bucks,* 18 L. J. (M.C.) 113.
(4) Law Rep. 7 Q. B. 16.
(5) Cas. K. B. t. Hardw. 301.

decision is final and cannot be questioned: *Reg.* v. *Glynne* (1) fully explains these distinctions. There the sessions quashed the order on the ground of the insufficiency of the corroborative evidence; but this Court expressly recognized the law that the order upon appeal is only final where the case has been heard on the merits. It is further to be observed that the Act 8 & 9 Vict. c 10, s. 2, enabled the mother to apply at petty sessions for another order, "where any order shall be quashed for any defect therein, and not on the merits." It is clear, therefore, that before we can grant a prohibition, we must be satisfied that the quarter sessions decided this case upon the merits. What is the meaning of a decision "upon the merits?" Now appeals may be decided upon the evidence and upon matters of form. The present is an intermediate case. If the complainant had designedly absented herself, together with her witnesses, from the hearing, I should have thought that it would be within our competence to refuse her relief. But she was accidentally absent, and because of her absence the order was quashed. I have come to the conclusion that to make an order of quarter sessions quashing a bastardy order an estoppel, there must have been a decision upon the evidence, and an order made merely because the mother was not present to support the order appealed from ought not to be regarded by the petty sessions as an estoppel, and that they should proceed to hear the evidence.

I do not express any opinion as to what course the petty sessions ought to adopt with regard to the costs of the appeal to quarter sessions, but if they were to refuse to hear the matter until these costs had been paid, I think it would be a matter for consideration whether we should grant a mandamus to compel them to proceed.

MANISTY, J., concurred.

Rule discharged.

Solicitors for appellant: *Digby & Jones, for Digby & Evans, Maldon.*

Solicitors for respondent: *Doyle & Sons, for H. Jones, Colchester.*

(1) Law Rep. 7 Q. B. 16.

1880
March 22.

THE QUEEN ON THE PROSECUTION OF MOWLAM *v.* PEARCE AND OTHERS.

Poor Law—Ex officio Guardians—County of a Town—"County, Riding, or Division"—4 & 5 Wm. 4, c. 76, ss. 38, 109.

In 4 & 5 Wm. 4, c. 76, s. 38—which enacts that every justice of the peace residing in any union and acting for the "county, riding, or division" in which the same may be situated, shall be an ex officio guardian of such union—the word "county" includes county of a town, and justices acting for a county of a town, with a separate commission of the peace, and residing within the union, are entitled to vote and act as ex officio guardians equally with resident justices for the county at large.

RULE in the nature of a quo warranto, calling on the defendants to shew cause by what authority they claimed to vote as ex officio guardians of the union of Poole.

It appeared from the affidavits that in the reign of Queen Elizabeth the town of Poole was incorporated by charter as a county distinct from the county of Dorset, the charter containing a provision for the election of justices for the town and county of Poole, to have the same power as ordinary county justices; and a non intromittant clause. The limits of the town and county were extended by 2 & 3 Wm. 4, c. 64, and after 5 & 6 Wm. 4, c. 76, justices for the borough so extended had been appointed according to that Act.

On March the 13th, 1879, a meeting of the guardians of Poole Union was held to elect a collector of poor-rates for the parish of St. James, Poole, and one Edmund Pearce was declared duly elected, the majority being arrived at by reckoning the votes of the defendants, who were justices for the town and county of Poole, and resided within the union, and who voted as ex officio guardians. Only one of the justices for the county at large resided within the union.

A. Charles, Q.C., and *F. V. Budge*, shewed cause. The question turns upon the construction to be put upon the words "justices of the peace acting for any county," in 4 & 5 Wm. 4, c. 76, s. 38. (1)

(1) By 4 & 5 Wm. 4, c. 76, s. 38, after providing for the government of the workhouses of any union by a board of guardians to be elected by the

There is no ground for contending that the word "county" does not include a county of a town such as Poole. The word "county" must be taken in its ordinary sense, so as to include any description of county, and if it were construed so as to exclude "county of a town," there might, in the event of a void election of guardians by ratepayers, be no justices of any description entitled to vote. Some reliance may be placed by the prosecution on the interpretation clause in s. 109, by which the words "justices of the peace" are made expressly to include justices acting for any county of a town, unless where otherwise provided by the Act, while in s. 38 the words "justices acting for any county" are used. But there is nothing to shew that the words of s. 38 were intended to have any other than their ordinary meaning, and as there is no definition of the word "county," it must be understood as "legal county," including county of a town.

A. Wills, Q.C., and *Pollard*, in support of the rule. The construction put by the defendants upon s. 38 is à priori inconvenient, as it enables the ex officio guardians to overrule those elected by the ratepayers, and it is not warranted by the words of the section, which gives the qualification of ex officio guardian to every justice of the peace, "acting for the county, riding, or division," in which the union is situated. The word "county" is here used in its ordinary popular sense of county at large, and does not include county of a town. This is shewn by the words "riding or division" which follow it, and which are not applicable to the county of a town, and by the interpretation clause, s. 109, which provides that the words "justice or justices of the peace" shall

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ratepayers in the parishes forming such union, it is enacted that, "every justice of the peace residing in any such parish and acting for the county, riding, or division in which the same may be situated, shall be an ex officio guardian of such workhouses, and after such board shall be elected, and shall until such guardians shall be duly elected and constituted, and also in case of any irregularity or delay in any subsequent election of guardians, receive and carry into effect the rules, orders, &c., of the commissioners, every such justice shall ex officio be and be entitled if he think fit, to act as a member of such board, in addition to and in like manner as such elected guardians.

By s. 109 the words "justice or justices of the peace" shall be construed to include justices of the peace of any county, division of a county, riding, borough, liberty—county of a city, county of a town, cinque port, or town corporate, unless where otherwise provided by this Act.

1880

THE QUEEN v. PEARCE.

include justices of the peace . . . . of any county of a city, county of a town, ... unless where otherwise provided by this Act—drawing a distinction between the two classes of justices. And, in s. 38 it is "otherwise provided" for the words are not merely "justice of the peace," but "justice of the peace for any county." In the Qualification Act, 18 Geo. 2, c. 20, s. 12, it is provided that the Act shall not extend to justices of a county of a town, shewing that the legislature may have reasons for making different provisions with respect to either description of justices. In *Evans* v. *Stevens* (1) it was held that the incorporated town of Seaford, which had an exclusive jurisdiction, did not come within the words "county, riding, or division" in an Act allotting penalties to the "county, riding, or division."

COCKBURN, C.J. I think this rule must be discharged. The interpretation clause, s. 109, only gives a meaning to the words "justice of the peace" where these words, and nothing more, are used, and, as this is not the case in s. 38, we are left to construe this section by itself without any assistance from the words in other sections. It has been argued for the prosecution that the word "county" in s. 38 is used only in the sense of a county having ridings or divisions, and that it applies to counties in the ordinary acceptation of the term, and not to a county of a town. But I think the words "riding or division" were put in ex majori cautelâ, to avoid contention, or the objection that ridings and divisions, not being counties in the ordinary acceptation of the term, were not within the meaning of the section. Can any reason be suggested for excluding justices such as the defendants from the privileges conferred by the Act? It was thought an advantage that persons occupying the position of justices should share the responsibilities of elected guardians, and borough justices are certainly of almost equal rank and influence with those appointed for the county proper. The provision in 18 Geo. 2, c. 20, s. 12, excepting counties of towns from the operation of the Act, which has been referred to by Mr. Wills, is, if anything, an authority against him, as it shews that it was supposed that, but for express provision, the words "any county, riding, or division" would include counties of towns.

(1) 4 T. R. 224.

1880

THE QUEEN v. PEARCE.

LUSH, J. I am of the same opinion. But for the interpretation clause as to "justices of the peace" in s. 109, no difficulty as to the construction of s. 38 would have arisen. But I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. The object of the Act was to provide assistants or substitutes for the elective guardians, in cases of irregularity of attendance or unavoidable delay. Sect. 38 enacts that any justice of any county, riding, or division shall be entitled, if he think fit, to act as guardian in addition to and in like manner as such elected guardians, shewing that it was contemplated that there might be a failure of the elective guardians. In such a case, if the borough justices were disqualified, the administration of the poor law might be stopped. It must have been intended that the ex officio guardians should act by themselves until the election of the representative guardians was completed, and it is easy to see what serious consequences might follow if there were an irregular election and the view of the prosecutors is the correct one. It appears that in the present case one of the justices for the county of Dorset happens to reside within the union; but this is a mere accident, and it might be that no justices, except borough justices, were resident within it. The object of s. 38 is obvious, and I think we are bound to give effect to it. The argument founded upon the words "riding or division" which follow "county" amounts to this, that a county like Cornwall, which has neither riding nor division, is not a county within the section. The rule must be discharged.

BOWEN, J., concurred.

Rule discharged.

Solicitor for prosecution: *H. T. Trevanion, Poole.*

Solicitors for defendants: *Vizard, Crowder, & Anstie, for Budge, Poole.*

1880
May 25.

McCOLLIN *v.* GILPIN AND OTHERS.

Company—Agreement signed by Directors, and not sealed with Company's Seal —Liability of Directors—Misrepresentation of Authority.

By the articles of association of the T. Company, Limited, the directors, with the sanction of the company in general meeting, were empowered to borrow money on mortgage of the company's lands or upon debentures, bonds, promissory notes, bills of exchange, and other transferable securities, or otherwise, as they should deem requisite for carrying on the works, &c. The plaintiff having been requested by the defendants, who were three of the directors of the company to advance money to the company, agreed to advance 500*l.* upon having an agreement signed by the defendants to pay the 500*l.* and interest at the end of six months upon the security of the machinery and tools of the company. The following agreement was afterwards written out and signed by the defendants and the plaintiff: "Agreement between the T. Company of the one part, and W. M. [plaintiff] on the other part. In consideration for the advance of 500*l.* paid by the said W. M. to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.* with interest in six calendar months from this date hereof. And we do hereby assign to the said W. M., as security for the said advance of 500*l.*, the machines and tools, as invoiced to him 3rd June, 1878 . . . ."

This document was not sealed with the seal of the company nor countersigned by the secretary, pursuant to the articles of association, nor did the defendants express that they signed on behalf of the company. The plaintiff, upon default in repayment of the loan at the expiration of six months, took possession of the machinery and tools, upon which the company obtained an injunction in the Chancery Division restraining him from dealing with the machinery, on the ground that the directors were not authorized to make the alleged assignment:—

Held, by Lush, J., first, that the defendants were personally liable for the repayment of the 500*l.*, notwithstanding the heading of the agreement, which must be rejected, since the agreement was not signed in a form binding on the company; secondly, that they were not liable for damages sustained by the plaintiff in respect of the proceedings for the injunction, as the agreement did not profess to be an assignment by the company, but only by the defendants as directors, and was therefore no representation by them that they had the authority of the company to assign its property.

ACTION for money lent with interest, and to recover the amount of certain costs incurred by the plaintiff. The action was tried before Lush, J., at the Leeds Spring Assizes, 1880, and reserved by him for further consideration. The facts and arguments sufficiently appear from the judgment.

May 7. The case was argued on further consideration by *Cave*, *Q.C.*, and *Dodd*, for the plaintiff.

A. Wills, Q.C., and *Lockwood*, for the defendants.

Cur. adv. vult.

May 25. LUSH, J., delivered the following judgment:—

This is an action against the directors of a trading company called the Turnbridge Iron and Boiler Works Company, Limited, to recover a sum of 500*l.* advanced to the company, with interest, and also to recover the costs which plaintiff had incurred, under the circumstances after mentioned, in defending his possession of certain machinery and tools alleged to have been assigned to him by way of security for the advance.

Upon the trial before me at Leeds, without a jury, it appeared that in May, 1878, the company was in difficulties, and that at a meeting of directors, the plaintiff, who had been introduced to them as a person likely to assist them, was applied to to lend the company 500*l.* for six months.

This he declined to do, alleging that he had not so much to lend, and was not used to lending money that way; but after some hesitation he said that if he procured the money, it would be on condition that he lent it to the defendants themselves.

They then asked if he would take a second mortgage on the premises. He refused, and was then offered security on the machinery and tools. In the result he agreed to make the advance on having an agreement signed by the defendants to pay the 500*l.* and interest at the end of six months, and in default to deliver over the machinery and tools at invoice price. An invoice was then made out, and the parties adjourned to have the agreement prepared.

On the 5th of June they met again to conclude the transaction. An agreement had in the meantime been prepared, which was intended to bear the company's seal. This the plaintiff refused to accept, and thereupon the agreement in question was written out and signed by the defendants and by the plaintiff. The question is, what is the construction which ought to be put upon this document. It is in these terms:—

"Agreement between the Turnbridge Iron and Boiler Works Company, Limited, of the one part, and William McCollin, Esq., of Hull, on the other part. In consideration for the advance of

1880

McCollin v. Gilpin.

the sum of 500*l.* paid by the said William McCollin, Esq., to the said company, we, the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.* with interest at the rate of 5 per cent. per annum, in six calendar months from the date hereof. And we do hereby assign to the said William McCollin, as security for the said advance of 500*l.*, the machines and tools as invoiced to him 3rd June, 1878, the machines to be delivered in the same condition for working as they are now. And the said William McCollin hereby agrees not to remove the said machines and tools from their present position except in default of the repayment of the said sum of 500*l.* with interest at the rate of 5 per cent. per annum at the expiration of six months from the present date.

"As witness our hands this 5th day of June, 1878."

This document is signed by the defendants and by the plaintiff, but it is not sealed with the seal of the company nor countersigned by the secretary, pursuant to the 52nd article of association, nor do the defendants ever express that they sign it on behalf of the company.

The only part which creates a difficulty is the heading, which declares the document to be an agreement between the company on the one part and the plaintiff on the other. This I presume was the heading of the agreement which was first written out and intended to be sealed with the company's seal, and which the plaintiff refused to accept. But, however that may be, as it stands it professes to describe a contract with the company; but when we turn to the signatures we find that this description is inaccurate, and that whatever might have been originally intended the document is not signed so as to bind the company, or as it would have been signed if the directors had intended to make it the contract of the company.

To proceed with the narrative, the 500*l.* was then and there advanced, and a receipt for it given by the secretary, who signed per pro for the company. No part of the principal or interest having been repaid the plaintiff at the expiration of six months took possession of the machinery and tools. The company thereupon commenced an action in the Chancery Division and obtained a perpetual injunction, restraining the plaintiff from removing, selling, or in any

1880

Mc COLLIN v. GILPIN.

way dealing with the machinery and tools, on the ground that the directors were not authorized to make the alleged assignment. The plaintiff claims in addition to the 500*l.* and interest the costs he has been put to, in taking possession and defending his right to the security.

The first question is, does the agreement bind the defendants personally to pay the 500*l.* It seems to me that to make it of any avail at all the heading must be rejected, since it is not signed in a form to be binding on the company. If it is read without the heading it is in terms an engagement in the nature of a guarantee by the defendants to repay the money, with interest in six months.

And I think the heading may be rejected without violence to any rule of law. The document will then be what the plaintiff stipulated for, namely, the security of the directors in their individual character.

The claim for damages occasioned by the action for an injunction was attempted to be sustained upon the authority of *Richardson* v. *Williamson* (1), as being a representation by the defendants that they had the authority of the company to assign the machinery and tools as security for a loan.

The 46th article of association empowers the directors, with the sanction of the company in general meeting, to borrow on mortgage of the company's lands, or upon debentures, bonds, promissory notes, bills of exchange, and other transferable securities, *or otherwise*, as they shall deem requisite for carrying on the works, &c. If the defendants had so executed this agreement as to make it in form the company's contract, the plaintiff would have been justified in assuming that they had received the requisite authority of the company in general meeting, and the defendants would have been then in the same position as the defendants in *Richardson* v. *Williamson*. (1) But the agreement does not contain or imply any such representation, inasmuch as it does not profess to be an assignment by the company but only by the directors as such.

Now, directors of these companies have no authority other than that which is given them by the articles of association, and these

(1) Law Rep. 6 Q. B. 276.

1880

Mc COLLIN v. GILPIN.

are open and supposed to be known to all persons who have dealings with the company.

The representation is that they in their capacity as directors, in virtue of their general authority, had power to assign, not that they have received the special authority which the articles empower a general meeting to give; and which fact persons dealing with them cannot be presumed to know: see *Beattie* v. *Lord Ebury*. (1)

I am, therefore, of opinion that the plaintiff is not entitled to the costs of resisting the injunction; but that he is entitled to judgment for 500*l*. and interest at 5 per cent.

Solicitors for plaintiff: *E. Jukes, for Laverack, Hull.*

Solicitors for defendants: *Torr & Co., for Wells & Hind, Nottingham.*

March 24.

[IN THE COURT OF APPEAL.]

DEBENHAM AND ANOTHER *v.* MELLON.

Husband and Wife—Authority to pledge Credit during Cohabitation—Necessaries —Revocation of Implied Authority.

A husband who is able and willing to supply his wife with necessaries, and who has forbidden her to pledge his credit, cannot be held liable for necessaries bought by her; and a tradesman, without notice of the husband's prohibition and without having had previous dealings with the wife with his assent, cannot maintain an action against him for the price of articles of female attire suitable to her station in life, and supplied to her upon his credit but without his knowledge or assent.

Jolly v. *Rees* (15 C. B. (N.S.), 628; 33 L. J. (C.P.) 177) approved of.

THE pleadings, so far as they were material, may be shortly stated as follows:—

Claim, that between the 1st of April, 1877, and the 13th of March, 1879, the plaintiffs sold and delivered to the defendant goods ordered for him by his wife as his duly authorized agent in that behalf.

Defence, that the defendant denies that the goods were ordered by his wife as his agent, and says that his wife was not his agent in that behalf, and had no authority, either express or implied, to

(1) Law Rep. 7 H. L. 102; 7 Ch. 777.

pledge the defendant's credit for the goods, as the plaintiffs knew or ought to have known.

Joinder of issue.

The case came on for trial in London during the Michaelmas Sittings, 1879, before Bowen, J., and a jury, and the following are the facts necessary to be stated:—

The plaintiffs were a firm of drapers, and they sued for the price of articles of dress sold by them to the defendant's wife. It was admitted that the prices were reasonable, and it was not disputed that the articles of dress were "necessaries" for the defendant's wife, in the sense that they were suitable to her degree and condition in life. The defendant relied upon a secret revocation of his wife's authority to pledge his credit. The defendant and his wife were called as witnesses, and stated that by an arrangement made between them he was to furnish her with money to supply herself and her children with clothes, and that he had positively forbidden her to exceed it. They lived together, and an allowance of 52*l.* a year was paid by the husband to the wife for that purpose. In some years the allowance was increased to 62*l.* The judge asked the jury whether, at the time when the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so; the jury answered this question in the affirmative. Judgment was ordered to be entered for the defendant.

The plaintiffs appealed.

March 20. *Benjamin, Q.C.*, and *A. L. Smith*, for the plaintiffs. It is competent for this Court to review the decision of the majority of the judges in *Jolly* v. *Rees* (1); it was the first case in which it was held that a secret revocation of a wife's authority is sufficient, and it cannot be maintained upon principle: it is, moreover, in conflict with *Ruddock* v. *Marsh* (2), which, it is submitted, was correctly decided. There was no evidence that the defendant had forbidden the plaintiffs to trust his wife; and a prohibition of this kind was necessary in order to exempt him from liability: *Manby* v. *Scott* (3); *Dyer* v. *East.* (4) The liability

(1) 15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177.

(2) 1 H. & N. 601.

(3) 2 Smith's L. C. (8th ed.) 445, at p. 468.

(4) 1 Mod. 9, per Kelynge, C.J.

1880

DEBENHAM v. MELLON.

of a husband depends upon the circumstance whether he cohabits with his wife: *Tod* v. *Stokes* (1): *Etherington* v. *Parrot* (2): *Waithman* v. *Wakefield* (3): in the present case cohabitation existed. In *Etherington* v. *Parrot* (2) the husband was held not to be liable, because he had given sufficient notice of the revocation of his wife's authority. Moreover, although a husband forbids a tradesman to trust his wife, yet he is not relieved from liability if he afterwards refuses to supply her with necessaries: *Bolton* v. *Prentice.* (4) It may be that the defendant would not be liable, if the goods sold by the plaintiffs had been supplied expressly upon the wife's credit: *Holt* v. *Brien* (5); but upon the evidence it does not appear that the plaintiffs intended to trust the wife alone. It seems to be laid down in the judgment of Bayley, J., in *Montague* v. *Benedict* (6), that even when a husband lives with his wife, he is not bound by her contracts if he supplies her with necessaries: but this is a principle hard to be explained, and, moreover, it was unnecessary to the decision of the action, which did not relate to necessaries. A wife is the ostensible agent of her husband during cohabitation, and it would be a hardship that a tradesman, trusting her without notice of the revocation of her authority, should be without remedy. Even in an action for work done for a mere mistress it is a proper question for the jury whether the defendant has given the plaintiff reason to believe that she was his agent, although in point of fact the order for the work has been given without the defendant's sanction: *Ryan* v. *Sams.* (7) The liability of a husband to pay for necessaries supplied to his wife arises out of the obligation imposed by the marriage contract to support her according to his estate and condition: and hence a husband may be bound to pay for necessaries supplied to his wife whilst he was a lunatic: *Read* v. *Legard.* (8) It was laid down in the judgment of the Court of Exchequer in *Johnston* v. *Sumner* (9) that "if a man and his wife live together, it matters little what private agreement they may make, the wife

(1) 12 Mod. 244.
(2) 2 Ld. Raymd. 1006.
(3) 1 Camp. 120, at p. 121; per Lord Ellenborough.
(4) 2 Strange, 1214.
(5) 4 B. & Ald. 252.
(6) 2 Smith's L. C. (8th ed.) 483, at p. 487.
(7) 12 Q. B. 460.
(8) 6 Ex. 636.
(9) 3 H. & N. 261, at p. 266; 27 L. J. (Ex.) 341, at p. 344.

has all the usual authority of a wife." That doctrine is in point for the plaintiffs in the present case, where the revocation by the defendant of his wife's presumable authority was a secret transaction. *Reid* v. *Teakle* (1) is not really against the plaintiffs, for they rely upon the implied authority which the defendant's wife had to pledge his credit.

The authorities, therefore, when fairly reviewed, support the contention for the plaintiffs; and when the question is considered as a matter of principle, the conclusion must be drawn in their favour. The mere fact of marriage and of cohabitation constitutes a wife her husband's agent in all matters relating to the household; and he cannot effectually revoke her apparent authority without giving notice of the revocation. If the husband himself carries on the business of the household, no presumption as to the agency of his wife arises; but if she is allowed to manage it, he is bound by her contracts, for she has been put into the place of his ostensible agent. If the judgment of Bowen, J., be upheld, it will always be necessary for a tradesman, before he trusts a married woman, to ascertain, by inquiry or by other means, whether she has authority to pledge her husband's credit; this is a burden which ought not to be imposed upon a tradesman.

March 22. *R. A. McCall,* for the defendant, was not called upon to argue.

Cur. adv. vult.

March 24. The following judgments were delivered:—

BRAMWELL, L.J. The question in this case is, whether the defendant is to pay for goods, which have been supplied by the plaintiffs to the defendant's wife without his authority, and indeed against it, and without his knowledge at the time of the supply. The goods were necessaries in the sense that they consisted of articles of dress suitable to the wife's station in life; but they were not necessaries in the sense that she stood in need of them, for she had either a sufficient supply of articles of a similar kind, or at least sufficient means from her husband or otherwise to acquire them without running him into debt for them. The question which arises in this case is always, and to a certain

(1) 13 C. B. 627; 22 L. J. (C.P.) 161.

1880

DEBENHAM v. MELLON.

Bramwell, L.J.

extent necessarily, argued upon technical considerations: no statute, no unvarying rule of the common law provides in what cases a husband shall or shall not be liable, but he is treated as a debtor or a person liable on a contract to pay, his obligation depending upon what used to be called an assumpsit, and the endeavour on the part of the tradesman is to shew that the wife was the agent of the husband to pledge his credit at the time when the debt was contracted. The point to be determined is, whether the defendant's wife had authority to bind him, or, to use the most general language, whether she had power to make him liable.

No doubt, there are cases in which a wife has what is called an agent's authority to bind her husband. I think it convenient to mention the following instances, though, of course, we have not to deal with them here. If a husband turns his wife out of doors, or conducts himself so that she is obliged to leave him, it is a legal duty upon him to maintain her; and if he will not himself perform that duty, she has power to provide for herself at his expense, that is to say, she can pledge his credit for, necessaries, such as food, apparel, lodging, and perhaps medicine and physic. In like manner when a wife is living with her husband, if he gives her nothing but the shelter of his house, she would have a right to provide food and apparel for herself at his expense, and he would be bound to pay for them. In cases such as these a wife has undoubtedly power to bind her husband. There may be cases in which a wife has a similar power when she and her husband are living and cohabiting together, and where the article bought upon credit is of such a kind and character that persons living in the same class of life with themselves, and having the same means, and living in the same neighbourhood, are in the habit of ordering it upon credit. Take the case of an ordinary butcher's bill: if it is not the practice of persons belonging to a particular class of life (and undoubtedly sometimes it is not), living in certain neighbourhoods in a certain style, to pay for each joint of meat at the moment of its delivery, and if the practice is to have weekly, monthly, or quarterly bills, it seems to me that the wife in such a case would have a presumable authority; and if the husband means to negative it, he not only must give her notice

that he withdraws it, but also must inform the tradesmen in the neighbourhood with whom she might deal that the presumable authority has been withdrawn. It seems to me that the authority exercised by a wife in a case such as I have mentioned does not spring merely out of the contract of marriage, but that the same authority would exist in favour of a sister, or a housekeeper, or other person presiding over the management of the house. I think that considerations of this sort formed the foundation of the judgment in *Ruddock* v. *Marsh*. (1) I have considerable doubt whether the Court of Exchequer was right in supposing that the necessary ingredients existed, and except upon the grounds which I have mentioned, I incline to think that the judgment in *Ruddock* v. *Marsh* (1) was wrong.

However that may be, the facts before us are of a different kind. In this case it cannot be pretended that there was any convenience in supplying the goods upon credit, nor has any practice or usage to that effect been proved to exist. Certainly, the Court cannot take judicial notice of a practice by wives to pledge their husband's credit for dresses, and I sincerely hope that in point of fact it is not their practice to do so. The question is, whether, there being no usage to warrant a dealing upon credit, and there being no authority but an actual prohibition on the part of the husband, his wife is nevertheless entitled to pledge his credit. I very much doubt whether the tradesman has any intention of trusting the husband: he hopes and expects that somehow the wife will get the money and pay for the goods without the husband knowing anything about the matter. This is not a question, whether a wife has authority to spend her husband's ready money. If she goes to a tradesman's shop and buys for ready money an article of necessity, I very much incline to think that the husband would not have a legal right to demand back the price from the tradesman, on the ground that he had told his wife not to spend his money upon the article, because he himself would have bought it for her if she really wanted it. The tradesman would be at liberty to reply to the husband, that he ought not to let his wife have the money if she was likely to misuse it. But I am not at all sure that this reasoning would apply, if she

(1) 1 H. & N. 601.

1880

DEBENHAM v. MELLON.

Bramwell, L.J.

ordered an article utterly beyond her station in life, because the tradesman would perhaps have notice that in taking the price he was doing what he ought not to do, and possibly he would have to return the money on the husband tendering the article back. However that may be as to transactions for ready money, the point to be now considered is whether a wife has power to pledge her husband's credit. Why should she have that power? Let me look at the position of all the parties. If a husband is desirous that his wife should have that power, he can give it to her in express terms: so far as he is concerned, it is unnecessary that the law should confer the power upon his wife. As to the tradesman, he need not deal with the wife upon credit, he need not trust her, he can carry on his business for ready money only. He may take another course: he need not treat the husband as his debtor: he may trust the wife only and reckon upon her getting the money to pay him from her husband. But also the tradesman can ask whether the wife has her husband's authority: if she says that she has, when in truth she has not, she would commit a fraud; and if the tradesman takes this precaution, she must commit a dishonest act in order to obtain the goods. And the tradesman may take a step further and refuse to trust the wife, unless the husband acknowledges either by word of mouth or in writing that he has conferred authority upon her. The tradesman is not under an obligation to trust the wife; and if he chooses to look to the husband for payment, why should he not be bound to obtain the authority of the husband before the goods are supplied for which the latter is to be held liable? It is argued that if a tradesman were to ask this question, he would offend his customers: the wife would not deal with him again, and the husband also might be annoyed that his wife's word had been doubted. This may be a reason why the tradesman should not ask the question: but it is no reason why if he does not, he should hold the husband liable when the latter has not consented that a debt should be contracted. It seems to me to be quite a mistake to suppose that, because it may be offensive to put a question necessary for the protection of both the tradesman and the husband, it will be better not to put it at all, and yet that the tradesman may compel the husband to pay for goods which have been supplied

1880

DEBENHAM v. MELLON.

Bramwell, L.J.

against his will. The plaintiffs' counsel have failed to adduce in support of their contention any valid reason founded upon convenience or usage; their argument is not justified by any authority, and therefore I am of opinion that the judgment of Bowen, J., should be affirmed. It would be a very mischievous state of the law, if a foolish woman and a tradesman eager for profit could combine together and do what might be a serious injury to the husband contrary to his orders and without his knowledge.

BAGGALLAY, L.J. I have had an opportunity of reading and considering the judgment which Thesiger, L.J., is about to deliver, and as it entirely expresses the views which I entertain upon the case, I simply desire that what he states should be considered as stated on my own behalf as well as his. At the same time I by no means dissent from the observations made by Bramwell, L.J.: they appear to me to be substantially in accordance with the view which I entertain upon the subject.

THESIGER, L.J. The state of facts upon which the judgment of the Court is to proceed I take to be as follows: a husband and wife living together: the husband able and willing to supply the wife with necessaries, or the means of obtaining them: an agreement between them, not made public in any way, that the wife shall not pledge her husband's credit: a tradesman, without notice of that agreement, and without having had any previous dealings with the wife with the husband's assent, supplying her, upon the credit of the husband, but without his knowledge or assent, with articles of female attire suitable to her station in life: an action brought against the husband for the price of such articles.

The question for us is whether the action is maintainable. I agree with the other members of the Court, and with Bowen, J., that it is not. The appellants' counsel have brought under our notice a considerable number of authorities with the view of establishing that the law as laid down in *Jolly* v. *Rees* (1) is erroneous. I think that the authorities have a contrary effect. They establish beyond controversy that the liability of a husband for debts incurred by his wife during cohabitation is based in the

(1) 15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177.

1880

DEBENHAM v. MELLON.

Thesiger, L.J.

main upon the ordinary principles of agency. It follows that he is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorized her to pledge his credit or has so conducted himself as to make it inequitable for him to deny, or to estop him from denying, her authority. In the present case express authority is out of the question, and there is no evidence that the defendant ever assented in any way to the act of his wife in pledging his credit to the plaintiffs.

But it is said that there is a presumption that a wife living with her husband is authorized to pledge her husband's credit for necessaries; that the goods supplied by the plaintiffs were, as it is admitted they were, necessaries; and that, as a consequence, an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term "presumption" in cases where it has been used with reference to a wife's authority to pledge her husband's credit for necessaries. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessaries upon her husband's credit and suing him, makes out a primâ facie case against him, upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands' credit in respect of matters coming within those departments. Such a presumption or primâ facie case is rebuttable, and is rebutted when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency, upon which, ex hypothesi, the liability of the husband is founded, would be practically of no effect.

Feeling this difficulty the appellants' counsel shift their ground, and contend that, although under the circumstances of this case the wife may have had no authority in fact or in law to pledge her husband's credit, yet the defendant must be taken to have held out his wife as having authority to pledge his credit to all persons supplying her with necessaries without notice that she had not authority in fact, and consequently is estopped as between him and the plaintiffs from denying her authority.

This contention appears to me to have no better ground of support than the one with which I have just dealt. If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognised continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume; just as it would forbid his denying the authority of a servant who had been in the habit of ordering goods for him from the tradesman, and whose authority he had secretly revoked. But what, in the case of a tradesman dealing with his wife without his knowledge or assent, has the husband done or omitted to do, which renders it inequitable for him to deny his wife's authority? For the tradesman it is said that the mere relationship of husband and wife entitles him to assume, in the absence of notice to the contrary, that the wife has authority to pledge her husband's credit for necessaries. But this is a fallacy. The tradesman must be taken to know the law; he knows (for the present argument proceeds upon that supposition) that the wife has no authority in fact or in law to pledge the husband's credit even for necessaries, unless he expressly or impliedly gives it her, and that what the husband gives he may take away. How, then, can the tradesman dealing with the wife, without any communication with or knowledge on the part of the husband, say that he is induced or invited by the husband to deal with the wife upon the faith and in the belief of her being in fact authorized to pledge her husband's credit? If he be so induced or invited, it can only be upon the footing of the law making a husband absolutely liable for necessaries purchased by his wife to any person dealing with her, although for the first time, without notice that her authority is limited; but if the law does so make him liable, there is no need for any estoppel, and we are driven back upon the exploded notion that the husband's liability is founded entirely upon some law other than that which governs in general the relations of principal and agent.

It is urged that it is hard to throw upon a tradesman the

1880

DEBENHAM v. MELLON.

Thesiger, L.J.

burden of inquiring into the fact of a wife's authority to buy necessaries upon her husband's credit. I assent to the answer that while the tradesman has at least the power to inquire or to forbear from giving credit, it is still harder, and is contrary if not to public policy yet to general principles of justice, to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted, and in respect to which even after such advertisement he may be made liable to a tradesman who is able to swear that he never saw it.

It appears to me that the decision of the majority of the judges in the case of *Jolly* v. *Rees* (1) has put the law as regards this matter upon a proper footing, and that there is no ground for disturbing the judgment in this case which the defendant has obtained.

Judgment affirmed.

Solicitors for plaintiffs: *Boyce & Ridley.*
Solicitors for defendant: *J. C. Button & Co.*

June 10.

WOODHOUSE *v.* WALKER.

*Waste, Permissive—Tenant for Life—Devise for Life of Premises subject to Obligation to Repair—Action for Non-repair by Remainderman in Fee against Executor of Tenant for Life—*3 & 4 *Wm.* 4, *c.* 42, *s.* 2.

A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Wm. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property:—

Held, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death.

APPEAL from the decision of the county court judge of Worcestershire.

(1) 15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177.

1880

WOODHOUSE v. WALKER.

The action was brought in respect of the non-repair of certain premises by the devisee in fee of the premises against the executor of a devisee for life of the same premises. The facts appear from the judgment. The county court judge gave judgment for the defendant, on the ground that the case did not come within 3 & 4 Wm. 4, c. 42, s. 2, as no action in respect of permissive waste by non-repair of the premises would have lain against the tenant for life in her lifetime.

May 5. *Whitaker* (of the Equity Bar), for the plaintiff, contended that the action lay under 3 & 4 Wm. 4, c. 42, s. 2, and if not that a contract to repair might be implied from the acceptance by the tenant for life of the benefit of the devise, and consequently that the action lay against the executor independently of 3 & 4 Wm. 4, c. 42, s. 2. [He cited *Caldwall* v. *Baylis* (1); *Marsh* v. *Wells* (2); *Burnett* v. *Lynch* (3); *Gregg* v. *Coates* (4); *Re Skingley* (5); *Messenger* v. *Andrews* (6); *Garth* v. *Cotton* (7); *Rees* v. *Engelback.* (8)]

Gye, for the defendant, contended that no such contract could be implied, and that the decision of the county court judge was right. [He cited *Powell* v. *Rees.* (9)]

Cur. adv. vult.

June 10. The judgment of the Court (Lush and Field, JJ.) was delivered by

LUSH, J. This is a special case stated by way of appeal from the decision of the judge of a county court, and it involves a point of considerable nicety. The action is brought by the reversioner against the executor of a tenant for life, for permissive waste by the non-repair of some houses which had been devised to the wife of the testator for life with remainder to the plaintiff in fee.

The devise was to the wife for her separate use during her life, "she keeping the houses in repair." She entered into possession

(1) 2 Mer. 408.
(2) 2 S. & S. 87.
(3) 5 B. & C. 589.
(4) 23 Beav. 33.
(5) 3 Mac. & G. 221.
(6) 4 Russ. 478.
(7) 1 W. & T. L. C. 5th Ed. 751.
(8) Law Rep. 12 Eq. 225.
(9) 7 A. & E. 425.

1880

WOODHOUSE v. WALKER.

on the death of her husband, and enjoyed the property for several years, but neglected to keep the houses in repair, and after her death the plaintiff entered and did the necessary repairs. This action is brought to recover out of her personal estate the expenses he has so incurred. It is remarkable that no direct authority is to be found for a case which must, we should suppose, have frequently occurred, and that we have to go back to first principles in order to find a solution of the question raised.

Before the statutes of Marlbridge (52 Hen. 3) and of Gloucester (6 Edw. 1, c. 5), an action for waste lay against a tenant in dower and tenant by the curtesy, but none against a tenant for life or years. The reason was, as stated by Coke in 2 Inst. 300, "for that the law created their estates and interests, therefore the law gave against them a remedy: but tenant for life or years came in by demise and lease of the owner of the land, &c., and therefore he might in his demise have provided against the doing of waste by his lessee, and if he did not, it was his negligence and default."

Here it is plainly implied that, where the grantor in his grant provides against the doing of waste, the grantee will be liable for waste in like manner as a tenant in dower or by curtesy was liable, and this is in perfect accordance with legal principle as expressed by the maxims, "Qui sentit commodum, sentire debet et onus et transit terra cum onere" (Co. Litt. 231a: and see per Holroyd, J., in *Burnett* v. *Lynch*. (1)) The first of these maxims has a very wide application in our law. See Broom's Maxims.

The statute of Marlbridge, c. 23, extended the common law liability by ordaining that "fermors during their term shall not make waste, sale nor exile of house, woods or men, nor of anything belonging to the tenements that they have to ferm without special licence had by writing of covenant making mention that they may do it, which if they do and thereof be convict they shall yield full damage and shall be punished by amerciament grievously."

The term "fermors" here, says Coke, 2 Inst. 145, comprehended all who held by lease for life or lives, or for years by deed or without deed, and the words "'do or make waste' in legal understanding in this place (as well as in the statute of Gloucester)

(1) 5 B. & C. 607.

includes as well permissive waste which is waste by reason of omission or not doing, as for want of reparation, as waste by reason of commission, as to cut down timber trees or prostrate houses and the like: for he that suffereth a house to decay which he ought to repair doth the waste."

The "special licence" mentioned in the statute of Marlbridge is commonly expressed by the well-known phrase "without impeachment of waste."

The statute of Gloucester gives, as a more stringent remedy, a writ of waste under which the tenant was liable to forfeiture of the thing wasted and treble damages.

The right of action against a tenant for life belongs to the owner in fee of the immediate reversion.

In course of time an action on the case founded on the Statute of Westminster 2, came to be substituted for the writ of waste, as being a more simple and practical remedy, and the writ of waste having fallen into disuse was ultimately abolished by 3 & 4 Wm. 4, c. 27, s. 36. But the rights and liabilities of the parties remained as before, the remedy only being changed: *Bacon* v. *Smith*. (1) It is not necessary in this case to enter into the question whether an action on the case for permissive waste can be maintained against a tenant for life or years, upon whom no express duty to repair is imposed by the instrument which creates the estate. The modern authorities, or rather the dicta upon this point, appear to be strangely in conflict with the ancient reading of the statutes. See notes to *Green* v. *Cole*. (2)

We think it must be held, upon the principle before mentioned, that in this case the tenant for life was liable at common law, and that the plaintiff as immediate reversioner had a right of action, and probably might have obtained an injunction against her for the permitted waste, if he had made such an application in her lifetime. The right of action which at common law would have died with the person is continued by 3 & 4 Wm. 4, c. 42, s. 2, against the executor, "so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executor shall have taken upon himself the administration of the

(1) 1 Q. B. 345. (2) 2 Wm. Saund. 251.

1880

WOODHOUSE v. WALKER.

estate and effects of such person." The wrong of not repairing was a continuing wrong, giving a cause of action de die in diem up to the day of the death of the tenant for life, and the action was brought within the six months after the death. The plaintiff, therefore, is entitled to recover by virtue of this statute. The view which we have taken makes it unnecessary to refer to the Equity cases which were cited in the argument. We wish, however, to observe that *Gregg* v. *Coates* (1) and *Messenger* v. *Andrews* (2) are striking illustrations of the principle that he who accepts a devise accepts it cum onere, and is bound to performance of the conditions on which it was made. In other respects, these and the other cases cited have no bearing on the present question.

The appeal must, therefore, be allowed, but as the amount of damages was not proved, the case must, according to the agreement of the parties, be remitted to the county court for the purpose of assessing them. It may save expense to the parties if we add that the proper measure of damages is the sum which was reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them.

Decision reversed.

Solicitors for plaintiff: *Edward Doyle & Sons.*
Solicitors for defendant: *Newman, Stratton, & Hilliard.*

(1) 23 Beav. 33. (2) 4 Russ. 478.

[IN THE COURT OF APPEAL.]

1879
Dec. 19.

WILLIAMS *v.* STERN.

Bill of Sale—Payment by Instalments—Default—Giving Time—Waiver.

The plaintiff gave the defendant a bill of sale on his goods as security for money advanced. The loan was to be repaid by instalments, and the bill of sale authorized the defendant at any time after the execution thereof to take and retain possession of all the goods comprised in it until all the money payable under it should have been satisfied. It also contained a power of sale. The plaintiff, having paid thirteen instalments, on the day when the fourteenth became due called upon the defendant and asked for time; the defendant replied that he would wait for a week, but he seized the goods upon the third day and sold them before any further default had been committed by the plaintiff. An action having been brought to recover damages for the seizure and sale, at the trial the judge asked the jury whether the defendant had so acted as to induce the plaintiff to believe that the defendant would hold his hand; the jury answered this question in favour of the plaintiff:—

Held, that there was no evidence of a waiver by the defendant, and that there must be a new trial.

Quære, whether *Albert* v. *Grosvenor Investment Co.* (Law Rep. 3 Q. B. 123) was correctly decided.

ACTION in the Court of Passage at Liverpool to recover damages for the seizure and sale of the plaintiff's goods.

By an indenture, being a bill of sale, and dated the 9th of July, 1878, and made between the plaintiff (thereinafter called the mortgagor) of the one part, and the defendant (thereinafter called the mortgagee) of the other part, after reciting that the mortgagor had applied to the mortgagee for an advance of 30*l.* and had agreed to pay the sum of 12*l.* as a consideration for the same, and that the mortgagee had consented to make the advance upon having those sums secured in manner thereinafter appearing, it was witnessed that in consideration of 30*l.* by the mortgagee paid to the mortgagor on the execution of the indenture, the mortgagor assigned to the mortgagee all the stock-in-trade, shop-fixtures, furniture, goods, chattels, and effects of the mortgagor then being in the shop, dwelling-houses, and premises of the mortgagor, situate in Liverpool, to hold the said property unto the mortgagee to and for his own use and benefit, subject to a proviso for redemption in case the mortgagor should pay to the mortgagee

1879

WILLIAMS v. STERN.

the sum of 42*l.* by twenty-five consecutive weekly payments of 1*l.* 5*s.* each on every Monday before noon, the first payment to be made on the 15th day of July instant, and the balance of 10*l.* 15*s.* on the 6th day of January, 1879. The indenture contained a covenant by the mortgagor with the mortgagee for the repayment of 42*l.*, and then contained the following declaration: "It is hereby declared and agreed that notwithstanding the aforesaid proviso for redemption it shall be lawful for the mortgagee at any time after the execution hereof to take possession of the said property and to retain such possession (either in and upon the said shop, dwelling-house, and premises, or in any other place to which the mortgagee may think fit to remove it) until all moneys payable under these presents, together with all expenses which may be incurred by the mortgagee in and about taking possession, removing, and retaining possession of the said property, shall be fully paid; and, further, that if default be made by the mortgagor in payment of any instalments of the sum of 42*l.* . . . on the days on which such instalments respectively shall become payable, the whole amount which at the time of such default shall be secured by these presents and shall be remaining unpaid shall at once become due and payable; and thereupon it shall be lawful for the mortgagee to sell the said property by public or private sale and receive the moneys arising therefrom, and retain to himself thereout all moneys remaining due on the security of these presents and all expenses which he may have incurred in taking and holding possession and removing and selling the said property, and all costs and charges which he may have incurred in defending and maintaining his rights, powers, and authorities under these presents; and that the surplus (if any) of such moneys shall be paid to the mortgagor . . . And it is hereby agreed and declared that it shall be lawful for the mortgagee and his agents from time to time during the continuance of this security to enter and remain upon the said shop, dwelling-house, and premises, or any other premises upon which the said property or any part thereof may be, for the purpose of taking and holding possession of the said property, or of there selling the same by auction or of removing the same, or for any other reasonable purpose in connection with these presents; and in case the mortgagee or his agents shall be

unable to obtain admission in the usual manner, it shall be lawful for him to break open the outer and inner doors and the windows in order to obtain admission." The other provisions of the indenture were immaterial to this action. The plaintiff paid thirteen weekly instalments; but on the day when the fourteenth became due, he had to attend the Court of Passage as juryman; he called upon the defendant and asked for time; the defendant said that he would not look to a week. Relying upon this statement of the defendant, the plaintiff served as a juryman for three days, but on the third day the defendant seized the plaintiff's goods and sold them within the current week and before any fresh default had been committed by the plaintiff. It was alleged that the defendant had heard that the plaintiff's landlord intended to distrain upon the goods for rent in arrear. The judge asked the jury whether the defendant had so acted as to induce the plaintiff to believe that the defendant would hold his hand; the jury answered this question in favour of the plaintiff and assessed the damages at 80*l.* The judge gave leave to move on the ground that there was no evidence of a waiver by the defendant. The Queen's Bench Division made absolute a rule for a new trial, but gave the plaintiff leave to appeal.

The plaintiff accordingly appealed.

F. W. Raikes, for the plaintiff. No default had been committed by the plaintiff, which justified the seizure of his goods by the defendant. *Albert* v. *Grosvenor Investment Co.* (1) is in point, and is a clear authority for the plaintiff. That which passed between the plaintiff and the defendant was tantamount to a waiver of the defendant's right to seize during a week.

D. French, for the defendant. The indenture of assignment in this case is different from the bill of sale in *Albert* v. *Grosvenor Investment Co.* (1), for in that case the instrument clearly contemplated that, under ordinary circumstances, the mortgagor should be allowed to remain in possession: in this case the defendant could seize at any time without any default on the part of the plaintiff. There was no evidence of any waiver by the defendant of his right to seize.

(1) Law Rep. 3 Q. B. 123.

1879

WILLIAMS v. STERN.

F. W. Raikes, in reply. The promise of the defendant to wait for a week was a suspension of his right to seize: *Hughes* v. *Metropolitan Ry. Co.* (1)

BRAMWELL, L.J. I think that this appeal must be dismissed. The plaintiff's evidence failed to shew that the defendant had no right to seize his goods. When the plaintiff allowed the appointed time to elapse without paying the instalment, he was in default: whenever there is an omission to do an act pursuant to the terms of a contract, there is a default in the performance of it. It has been argued for the plaintiff that after the defendant had promised to wait for a week, he could not lawfully seize the plaintiff's goods; but I do not think that his promise was sufficient to prevent him from putting in force the powers of the bill of sale: it was not an undertaking which bound him: the promise was not supported by any consideration. The plaintiff was not induced to alter his position. A promise to wait founded upon a good consideration would have prevented the defendant from seizing the goods comprised in the bill of sale, even though a distress by the plaintiff's landlord had been threatened. For the plaintiff reliance has been placed upon *Albert* v. *Grosvenor Investment Co.* (2); but I cannot accede to the decision in that case, because I entertain great doubts whether it was correct. That was a seizure upon an alleged default, and upon the facts before them the Court of Queen's Bench held that there had been no default. But whether that decision was right or wrong, in the present case there was no evidence of a valid waiver by the defendant: no benefit accrued to him from his promise. The appeal must be dismissed.

BRETT, L.J. I agree with the view of the law enunciated by Bramwell, L.J. I think that upon the true construction of the indenture the defendant was entitled at any time to take possession of the goods comprised in it. If, however, a default was necessary in order to enable the defendant to seize, I think that such a default had occurred: for "default" means simply the non-payment of money, and the plaintiff had failed to pay one of the instalments at the time when it became due. On behalf of the

(1) 2 App. Cas. 439. (2) Law Rep. 3 Q. B. 123.

plaintiff reliance was placed upon the circumstance that the defendant had promised to wait for a week. This was not a misstatement as to existing facts: it was a mere naked promise not binding upon the defendant. Has there been any misconduct on the part of the defendant? I think not: it appears that a distress by the plaintiff's landlord had been threatened; and under these circumstances I do not blame the defendant for changing his mind. In my opinion the decision in *Albert* v. *Grosvenor Investment Co.* (1) did alter the meaning of the words used by the contracting parties. I cannot agree with that decision. In this case there was no evidence to shew that the defendant had waived any of his rights under the indenture, and the case ought to have been withdrawn from the jury. There must be a new trial.

COTTON, L.J. The only question before us is whether the indenture conferred upon the defendant a power to seize and sell the plaintiff's goods under the circumstances which actually happened. I agree that the plaintiff was in default when he failed to pay the instalment, for "default" simply means non-payment of a sum of money which is due. Did the alleged promise of the defendant prevent him from seizing and selling the plaintiff's goods? It was not founded upon any consideration. It seems to me that nothing rendered the seizure and sale wrongful. The defendant made no representation which operated to the plaintiff's disadvantage: he simply uttered his own private intentions: he gave no promise which was enforceable in law. The plaintiff has no claim for relief in equity: before the Supreme Court of Judicature Acts, 1873, 1875, the Court of Chancery would not have interfered to set aside the seizure.

Appeal dismissed.

Solicitor for plaintiff: *Bartlett, Liverpool.*

Solicitors for defendant: *Chinery & Aldridge, for Nordon & Mason, Liverpool.*

(1) Law Rep. 3 Q. B. 123.

1880
June 11.

[IN THE COURT OF APPEAL.]

IRVINE & CO. *v.* WATSON & SONS.

Principal and Agent—Undisclosed Principal, Sale of Goods to Agent of—Payment by Principal to Agent, under what Circumstances an Answer to an Action brought by the Seller for the Price.

The defendants employed C., a broker, to buy oil for them. C. accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery;" but, though it is not infrequent in the oil trade in such a case to require payment before delivery, there is no invariable custom to that effect. The plaintiffs delivered the oil to C. without insisting on prepayment, and the defendants, not knowing that the plaintiffs had not been paid, paid C. Shortly afterwards C. stopped payment, and the plaintiffs thereupon sued the defendants for the price:—

Held, affirming the decision of Bowen, J., that, as the plaintiffs at the time of the sale knew the broker was buying for principals, and not on his own account, the fact of the defendants having paid the broker did not preclude the plaintiffs from suing them for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker; and that the mere omission on the part of the plaintiffs to insist on prepayment was not, in the absence of an invariable custom to that effect, such conduct as would reasonably induce such belief.

Heald v. *Kenworthy* (10 Ex. 739; 24 L. J. (Ex.) 76) followed.

Armstrong v. *Stokes* (Law Rep. 7 Q. B. 598) discussed.

THIS was an action brought to recover the price of certain casks of oil. The facts sufficiently appear from the judgment of Bowen, J., reported supra, at p. 103. Bowen, J., on further consideration, gave judgment for the plaintiffs, and the defendants appealed.

Gully, Q.C., and *Crompton*, for the defendants. First, assuming that the rule laid down by Parke, B., in *Heald* v. *Kenworthy* (1) is correct, and that it is necessary to shew that the payment to the broker was the result of some misleading conduct on the part of the sellers, that was the case here; for the contract was for "cash on or before delivery," and the defendants, therefore, had a right to suppose that the plaintiffs would not part with the possession of the goods without getting the money. The parting with possession

(1) 10 Ex. 739; 24 L. J. (Ex.) 76.

would, as between business men, amount to a representation by the plaintiffs that the broker had already paid them. Secondly, the defendants contend that the case of *Heald* v. *Kenworthy* (1) has been substantially overruled in *Armstrong* v. *Stokes*. (2) The latter case decides that payment to the broker, at a time when the seller still gives credit to the broker, discharges the buyer; and here the plaintiffs still gave credit to Conning at the time when the defendants paid him.

W. R. Kennedy (*Sir Farrer Herschell, S.G.*, with him), for the plaintiffs.

[The Court intimated that they would not trouble counsel to argue the first point.]

It was not intended in *Armstrong* v. *Stokes* (2) to overrule *Heald* v. *Kenworthy* (1), and the rule laid down by Parke, B., is still law. The present case is distinguishable from *Armstrong* v. *Stokes* (2); there the intermediary was not a mere broker, but a commission merchant, who probably could have sued his principal for goods sold and delivered; here the defendants employed a person who was a broker and broker only, and they consequently knew, from the general character of the agent's business, that he had probably passed their name to the seller. They would, therefore, have no right to suppose that the seller was giving credit to the agent and to the agent alone. They must have known that there was somebody who would probably look to them for payment; and, accordingly, paid their agent at their own risk. But even if the defendants' contention on this point is right, they cannot set up payment to the broker as a defence to this action, for they never, in fact, paid him specifically for the oil. What they did was to pay the broker the price of other parcels of goods along with that of the oil in a lump sum; there was no payment of any sum specifically appropriated to this particular purchase; it merely amounted to the placing of money on the credit side of a general running account.

[BRETT, L.J. But the dicta in *Thomson* v. *Davenport* (3) go the length of saying that a settlement on account is sufficient.]

Gully, Q.C., was heard in reply.

(1) 10 Ex. 739; 24 L. J. (Ex.) 76. (2) Law Rep. 7 Q. B. 598.
(3) 9 B. & C. 78.

1880

IRVINE v. WATSON.

BRAMWELL, L.J. I am of opinion that the judgment must be affirmed. The facts of the case are shortly these:—The plaintiffs sold certain casks of oil, and on the face of the contract of sale Conning appeared as the purchaser. But the plaintiffs knew that he was only an agent buying for principals, for he told them so at the time of the sale, therefore they knew that they had a right against somebody besides Conning. On the other hand, the defendants knew that somebody or other had a remedy against them, for they had authorized Conning, who was an ordinary broker, to pledge their credit, and the invoice specified the goods to have been bought "per John Conning." Then, that being so, the defendants paid the broker; and the question is whether such payment discharged them from their liability to the plaintiffs. I think it is impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief. But it is contended that the plaintiffs here did mislead the defendants into such belief, by parting with the possession of the oil to Conning without getting the money. The terms of the contract were "cash on or before delivery," and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that that is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts of the case to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case noninsistance on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here; the evidence before Bowen, J., shews that there is no invariable custom to that effect.

Apart from all authorities, then, I am of opinion that the defendants' contention is wrong, and upon looking at the authorities, I do not think that any of them are in direct conflict with

1880

IRVINE v. WATSON.

Bramwell, L.J.

that opinion. It is true that in *Thomson* v. *Davenport* (1) both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the dicta of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or no, the opinion of Parke, B., in *Heald* v. *Kenworthy* (2) seems to me preferable; it is this, that "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." That is in my judgment a much more accurate statement of the law. But then the defendants rely on the case of *Armstrong* v. *Stokes*. (3) Now that is a very remarkable case; it seems to have turned in some measure upon the peculiar character filled by Messrs. Ryder as commission merchants. The Court seemed to have thought it would be unreasonable to hold that Messrs. Ryder had not authority to receive the money. I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defendant, for as commission merchants they were not mere agents of the buyer. Moreover the present is a case, which Blackburn, J., there expressly declines to decide. He expressly draws a distinction between a case in which, as in *Armstrong* v. *Stokes* (3), the seller at the time of the sale supposes the agent to be himself a principal, and gives credit to him alone, and one in which, as here, he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is.

It is to my mind certainly difficult to understand that distinc-

(1) 9 B. & C. 78.

(2) 10 Ex. 739; 24 L. J. (Ex.) 76.

(3) Law Rep. 7 Q. B. 598.

1880

IRVINE v. WATSON.

Bramwell, L.J.

tion, or to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default. But it is sufficient here that the defendants did know that the sellers had a claim against them, unless the broker had already paid for the goods.

In this view of the case it is unnecessary to consider the further question raised by Mr. Kennedy, as to whether a payment on a general running account, as distinguished from a payment specifically appropriated to the particular purchase, would be sufficient to bring the case within Lord Tenterden's qualification of the general rule.

BAGGALLAY, L.J. I am of the same opinion. When the case was before Bowen, J., two questions were raised; first, whether the broker had authority to bind and did bind the defendants, and secondly whether, assuming that he done so, the defendants were exonerated by anything which subsequently occurred. The first question is one of fact, which I agree ought to be answered in the affirmative. Then did anything occur subsequently to discharge the defendants? It is said that they paid the brokers, and that that fact operated as a discharge. I may say that I doubt whether their acceptances being in settlement of a general account could strictly be said to be payment for the oil, but I am content to treat them as such. What then was the effect of that payment? If the dicta in *Thomson* v. *Davenport* (1) are to be taken as strictly correct, they certainly go a long way to support the defendants' contention. But it is to be observed that they were mere dicta, and quite unnecessary to the decision. The largeness of those dicta has since been dissented from by Parke, B., in the case of *Heald* v. *Kenworthy* (2), and with his dissent I entirely agree. He sought to limit the qualification of the general rule to cases, in which the seller by some conduct has misled the buyer into believing that a settlement has been made with the agent. And if

(1) 9 B. & C. 78. (2) 10 Ex. 739; 24 L. J. (Ex.) 76.

that limitation is correct, I am of opinion that there is no such payment here as would discharge the defendants.

But reliance is placed upon the case of *Armstrong* v. *Stokes* (1) as establishing the doctrine that the buyer is released from liability, if he pays the agent at a time at which the seller still gives credit to the agent—and it is contended that as that state of facts existed here, the defendants are accordingly discharged. But I think that is not the true view of the decision in *Armstrong* v. *Stokes*. (1) It must be accepted with reference to the particular circumstances of that case. There at the time of the payment by the principal to the brokers, the sellers still gave credit to the brokers and to the brokers alone. But that is not the case here; the plaintiffs it is true gave credit to Conning, but they did not give him exclusive credit. I do not think I am running counter to any of the decided cases in thinking that this judgment must be affirmed.

BRETT, L.J. The material facts of this case are these. There is a contract for the sale of goods made between the plaintiffs and the defendants through the agency of one Conning, a broker. But in making this contract Conning acted solely as agent of the defendants, not as agent of the plaintiffs at all. The contract was for "cash on or before delivery;" and the goods having been delivered, the defendants pay Conning, who, as I have said before, was their agent and no one else's. Now, apart from authority, I should certainly say that a payment to such an agent could not be a good payment to the plaintiffs. But then it is said that it is a good payment within the dicta of *Thomson* v. *Davenport* (2); but there the question for the decision of the Court was, not whether a payment by the principal to the agent precluded the seller from suing the principal, but, whether the seller could sue the principal at all. The main proposition laid down by Lord Tenterden was this, "that if a person sells goods, supposing that at the time of the contract he is dealing with the principal, but afterwards discovers that the person with whom he has been dealing is not the principal, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover

(1) Law Rep. 7 Q. B. 598. (2) 9 B. & C. 78.

1880

IRVINE v. WATSON.

Brett, L.J.

the amount from the real principal." He then introduces a qualification, "subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." Now the terms of that qualification are certainly very wide, and Bayley, J., in qualifying the above general rule uses equally wide language: "If the principal has paid the agent, or if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

And Maule, J., in the case of *Smyth* v. *Anderson* (1), expresses himself in the same general terms. But there again the point did not directly call for decision. Now, I think it is not fair to put a strictly literal interpretation on the language used by judges when merely glancing at by matters, with their minds mainly directed to another question, and, tying them down to the very words they used, to assume that those words contained in their opinion an absolutely accurate statement of the law. I do not think those dicta were so intended to be read. In *Heald* v. *Kenworthy* (2), however, the question directly arose. And Parke, B., after citing the dictum of Bayley, J., to the effect that the seller cannot sue the principal if the state of accounts between the principal and the agent would make it inequitable that he should do so, proceeds to ask what equity there can be, unless it is something arising out of the conduct of the seller, something to induce the defendant to believe that a settlement has already been made with the agent.

If the authorities stood there, I should have no doubt that the limitation put by Parke, B., on the earlier wide qualification was correct. But it is suggested that that limitation was overruled in *Armstrong* v. *Stokes*. (3) I think, however, that the Court there did not intend to overrule it, but to treat the case before them as one to which the limitation did not apply. I think they noticed the peculiar character of Manchester commission merchants. Probably their decision means this, that, when the seller deals

(1) 7 C. B. 21; 18 L. J. (N.S) C. P. 109.

(2) 10 Ex. 739; 24 L. J. (Ex.) 76.

(3) Law Rep. 7 Q. B. 598.

with the agent as sole principal, and the nature of the agent's business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent. Or it may perhaps be that Blackburn, J., finding the wider qualification in the very case which lays down the general rule, felt himself bound by the terms of that qualification, and applied them to the case before him.

If the case of *Armstrong* v. *Stokes* (1) arises again, we reserve to ourselves sitting here the right of reconsidering it.

The only other question is whether the present case falls within the qualification as limited by Parke, B., whether there was any misleading conduct on the part of the plaintiffs. But the only thing relied on by the defendants on that point was the noninsistance on prepayment by the plaintiffs. And I do not think that that amounted to laches, or was such an act as would justify the defendants in supposing that Conning had already paid the plaintiffs.

BAGGALLAY, L.J. I wish to add that Littledale, J., in the case in *Thomson* v. *Davenport* (2), confined his judgment to the general rule.

Appeal dismissed.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Bateson.*
Solicitors for defendants: *Clarke & Son, for Dunning & Kay.*

(1) Law Rep. 7 Q. B. 598.

(2) 9 B. & C. 78.

1880
June 10.

[IN THE COURT OF APPEAL.]

RAINBOW AND WIFE *v.* JUGGINS.

Bankruptcy—Secured Creditor—Omission to value Security—Lapsed Policy of Life Insurance—Discharge of Surety.

The defendant became surety for the repayment of a sum of money advanced by the plaintiff to P. Under the terms of the contract of suretyship P. deposited with the plaintiff a policy of insurance on his life by way of collateral security. P. failed to pay the premiums on the policy, which in consequence lapsed. Subsequently to the expiry of the policy P. became bankrupt, and the plaintiff proved against P.'s estate for the whole amount of the debt due to her, without putting any value on the policy, which was consequently ordered by the Court of Bankruptcy to be delivered up to the trustee.

The question was whether the plaintiff, by adopting that course, had discharged the defendant from his liability as surety:—

Held, affirming the decision of Manisty, J., that she had not, and for two reasons: first, that the defendant's position had not been altered by the surrender of the policy to the trustee, for, having lapsed, it was a mere piece of waste paper of no marketable value whatever; and, secondly, that, even assuming it had some value, and could, therefore, be said to be a security, the plaintiff was none the less entitled to exercise the option given by the Bankruptcy Act of surrendering the security to the trustee and proving for the whole debt, because there happened to be a surety for the payment of that debt.

ACTION upon a promissory note signed by the defendant as surety to secure an advance made by the female plaintiff to one Pratt. Manisty, J., upon further consideration gave judgment for the plaintiff. The defendant appealed.

The facts are sufficiently set out, ante, p. 138.

H. Matthews, Q.C., and *R. T. Reid*, for the defendant. The defendant's position has been altered by the omission to value the policy. That omission caused it to be forfeited to the trustee and thereby lost to the defendant. The policy, no doubt, had lapsed at the date of the proof, but its lapse did not render it altogether valueless. It is an almost universal practice among insurance companies to reinstate lapsed policies on payment of the arrears of premium and interest. And the fact of that practice gives a policy a marketable value after it has ceased to have a legal one. It is like the case of a slip of marine insurance, which though not of any legal value has certainly a marketable

value; and if money were lent on the security of such a slip, the creditor would, on the bankruptcy of the debtor, be bound to value the slip in his proof, if he wished to retain his rights against a surety. The surety's position is altered, if he is deprived of a reasonable anticipation of getting something.

A. Wills, Q.C., and *H. D. Greene*, for the plaintiff, were not called upon.

BRAMWELL, L.J. I am of opinion that the judgment of Manisty, J., should be affirmed, and upon two grounds; in the first place, I think that the position of the surety was not altered. I am very much inclined to think that the plaintiff might have left out all mention of this policy in her proof; for having lapsed it was a mere piece of waste paper—it was no security at all. It was nothing more than the foundation of a moral claim on the mercy and indulgence of the insurance company. And if it was not a security, then I cannot help thinking that it is very doubtful whether the Court of Bankruptcy had any jurisdiction to order it to be delivered up to the trustee.

But there is another ground upon which the judgment may be affirmed, which was suggested by Baggallay, L.J., during argument; it is this: Where a man enters into a contract of suretyship, he, it is true, bargains that he shall not be prejudiced by any improper dealing with securities to the benefit of which he as surety is entitled; but he makes that bargain with reference to the law of the land, and if the law of the land says that under such and such circumstances certain things must take place in order to enable the creditor to do the best he can for his own protection, then the contract of suretyship must be taken to be made subject to the liability of those things taking place. Now the plaintiff was entitled to prove for the full amount of her debt if she thought it best for her own protection to do so, and if the law is, as undoubtedly it is, that she could not so prove without surrendering the policy to the trustee (assuming it to be of some value), then the bargain of the surety must be taken to have been made subject to the liability of the policy being surrendered to the trustee in the event of the bankruptcy of the principal debtor. And in such a case I think the utmost the surety would be

1880

RAINBOW v. JUGGINS.

entitled to say would be, "You must make me some allowance for the loss which has been occasioned to me by the way in which you have availed yourself of your rights."

If there were no bankruptcy, probably the creditor would not have a right to sell the policy; I should imagine that all he could do would be to keep the policy on foot himself. But in the case of bankruptcy, he would have a right to give up the policy and call upon the surety for the difference.

BAGGALLAY, L.J. To my mind Mrs. Rainbow was undoubtedly a secured creditor of the debtor Pratt within the definition given in s. 16, sub-s. 5, of the Bankruptcy Act, 1869. But if she was a secured creditor, then it was open to her to take the course pointed out by sub-s. 4 of s. 16, which runs thus: "A secured creditor shall, for the purpose of voting, be deemed to be creditor only in respect of the balance (if any) due to him after deducting the value of his security; and the amount of such balance shall, until the security be realized be determined in the prescribed manner. He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him." Now, "the prescribed manner" is to be found in rule 99, which provides that "a secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security." But a creditor who so assesses the value of his security is at this disadvantage, that if the security afterwards realizes a larger amount than that at which it was assessed, he has under rule 100 to account to the trustee for the excess, whereas if it realizes less he gets no corresponding return.

A prudent secured creditor, therefore, would, under ordinary circumstances, elect to hand over the security to the trustee, and prove for the whole debt due to him.

But, as I ventured to observe during the argument, a secured creditor is not to be deprived of the exercise of the option which

is given to him by the Bankruptcy Act, or prevented from adopting that course in relation to his security which is most beneficial to himself, simply because there happens to be a surety for the payment of his debt; for I think it must be taken that where three persons enter into the relations of creditor, debtor, and surety, the possible bankruptcy of the debtor is an event which the surety has in his contemplation at the time of entering into the contract of suretyship, and that consequently it becomes an implied term of that contract that, in the event of the bankruptcy occurring, the creditor shall be entitled to exercise that option which the bankruptcy law gives him in the way which is most advantageous to himself. I am of opinion, therefore, that Mrs. Rainbow was none the less entitled to prove for her whole debt, because there was a surety for the payment of that debt, and that, having regard to the fact that she did so prove, the order made in March, 1879, by the Court of Bankruptcy ordering her to give up the policy to the trustee, was in strict accordance with what ought to have been done.

BRETT, L.J. If this policy had been in existence, and of some value, at the time of the proof made against Pratt's estate, and Mrs. Rainbow had consequently been a secured creditor, I should have agreed with what I understand to be the judgments of Bramwell and Baggallay, L.JJ., that the fact of her not having assessed its value would not have discharged the defendant from his liability as surety, and for the reasons given in those judgments.

But I confess I go further in this case; it seems to me that, even if she was, as matters stood, technically a secured creditor, she was not bound to do that which was impossible, and assess the value of that which was valueless; and I think it is absurd to say that any legal consequence can follow from her not having stated that this policy was of no value, when in truth it was of no value.

But I go further still. The defence to this action is founded on the assertion, that the position of the defendant was altered by an act, which was done or omitted to be done by Mrs. Rainbow, at the time when she made her proof in the Court of Bankruptcy. It is therefore necessary to consider what was the position of the

1880

RAINBOW v. JUGGINS.

defendant at that time. His position at that moment was that of a surety for a debt which was due to Mrs. Rainbow. And it is said that at that moment Mrs. Rainbow held a collateral security for that debt. Now no doubt if she had so held a collateral security, the surety would have been entitled to the benefit of that security, and if she had done any act involving the loss of that security, that would under ordinary circumstances have discharged the surety. But in my opinion Mrs. Rainbow at that moment had no collateral security, and therefore the defendant was in the position of a person who was a surety for a debt for which there was no collateral security, so that she was not a secured creditor within the meaning of s. 16, of the Bankruptcy Act, and he was not the surety of a secured creditor.

But if she was not a secured creditor, then what she did was, in any view of the case, perfectly right. She was perfectly entitled to prove for her whole debt without even mentioning the existence of the policy, for by so proving, she did not do any act involving the loss of a security, there being no security to lose.

I say she was not a secured creditor, because although at one time she had held a security, namely, this policy of insurance, yet at the time when the act was done, which is said to have released the defendant, she had no longer any security. The policy was not in existence; it had lapsed; and there was no power in any Court of Law or Equity to make the insurance company reinstate it. It was at that time of no marketable value whatever, and it seems to me absurd to suppose that any man of business would have given a penny for it.

Mr. Reid suggested in the course of argument that this was like the case of a slip of marine insurance, which, though of no legal value, ought to be mentioned and valued in the proof as a security, because it has a marketable value, by reason of the universal practice of underwriters to recognise the moral obligations created by it; and then he argued that, there being an equally universal practice amongst Life Insurance Companies to reinstate policies which have been allowed to lapse by reason of nonpayment of the premium, a lapsed policy also has a marketable value, and ought equally to be valued in the proof. But even assuming that there is such a constant practice, as is contended, to reinstate policies

which have lapsed, in cases in which the time for paying the premium has by accident been allowed to go by, that is not the case here. This was not a case of mere oversight, but one in which the holder of the policy deliberately abstained from paying first one premium and then another, simply because he had not got the money to pay them. And under such circumstances as those I think the improbability of the company reinstating the policy was so great, that no one would have given a penny for the chance of their doing so.

I think, therefore, that on these grounds the judgment must be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Prior, Bigg, Church, & Adams.*
Solicitor for defendant: *Charles Mallam.*

[IN THE COURT OF APPEAL.]

June 16.

WARD *v.* PILLEY.

Practice—Referee—Judicature Act, 1873, *s.* 57—*Prolonged examination of Accounts—Reference of all Issues in the Action to Official Referee—Order XXXVI., rule* 5.

Any question of account which may be referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854, may also be referred compulsorily to an official referee under s. 57 of the Judicature Act, 1873.

In any case in which the Court has jurisdiction to refer compulsorily a question of account to an official referee, it has also jurisdiction so to refer all the other issues in the action.

APPEAL from an order of Lush and Field, JJ., rescinding an order of a master referring all the issues in the action to an official referee.

This was an action on a builder's bill containing a large number of items, the particulars of which filled twenty-eight sheets. The defendant denied his liability, and further counter-claimed for money lent, and for damages for breach of an agreement by the plaintiff to advance money for the purpose of enabling the defendant to meet a certain bill of exchange accepted by him at the plaintiff's request.

1880

WARD v. PILLEY.

Notice of trial was served on the 24th of February, and on the 28th of May the defendant took out a summons to shew cause why all the issues in the action should not be referred to an official referee.

A master having ordered all the issues to be so referred, Lindley, J., confirmed the order; but on appeal to the Queen's Bench Division that order was rescinded, the Court being of opinion that the questions of account arising in the action were not such as would require a "prolonged examination" within the meaning of s. 57 of the Judicature Act, and that consequently there was no jurisdiction to make the order. The Court, however, at the same time intimated that the accounts were such as to come within s. 3 of the Common Law Procedure Act, 1854, and that when the cause came to nisi prius the judge would undoubtedly refer them to a master.

The defendant appealed.

Harmsworth, for the defendant. These are accounts "requiring a prolonged examination."

[BRETT, L.J. That means "prolonged" if had before a jury, not if had before a skilled accountant.]

In *In re Leigh* (1) the particulars of the claim, which was for goods sold and delivered, contained only twenty-four items, and yet Hall, V.C., sent the matter to an official referee.

Boxall, for the plaintiff. There is a preliminary objection that this summons was out of time, not having been taken out within the time limited by Order XXXVI., rule 5. In *Lascelles* v. *Butt* (2) a summons for a reference to an official referee, which was not taken out within four days after notice of trial, was held by Bacon, V.C., to be too late.

On the point as to whether the accounts here will require a prolonged examination, the case of *Green's Trustee* v. *Barrett* (3) is against the defendant's contention.

BRAMWELL, L.J. I am of opinion that the Queen's Bench Division had jurisdiction to make the order asked for, and might,

(1) 3 Ch. D. 292. (2) 2 Ch. D. 588.
(3) Weekly Notes, 1875, p. 204.

had they so chosen, have exercised their discretion in favour of making it. But they did not exercise their discretion either one way or the other, for they thought they had no jurisdiction to make it at all. With that I cannot agree. The section of the Judicature Act under which the Court were asked to make this order, s. 57., runs thus: "In any cause or matter requiring any prolonged examination of accounts, the Court may order any question of account arising therein to be tried before an official referee." What is a "matter requiring a prolonged examination of accounts," it is difficult to define exactly. But I think that what the legislature intended by the section was this: I think they meant to give the Court power to refer compulsorily to an official referee any matter of account, which it might have referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854.

But the questions of account in the present case are such as the Court would certainly be entitled to refer to a master under that Act, I think, therefore, that it had also jurisdiction to refer them to an official referee.

And, further, I think that wherever the Court has jurisdiction to refer any question of account to an official referee, it also has jurisdiction to refer to him any other matters arising in the same action. I believe that not long since a notion got abroad that under s. 3 of the Common Law Procedure Act we had power to refer questions only of account and not other matters, but that mistake we set right in a case which we decided in this Court at the last sittings. There is this strong objection to referring some only of the issues and leaving others to be tried by a jury, that you have two trials instead of one, and so involve double expense.

The Court then having jurisdiction under s. 57 to make the order, there is this further question, whether they ought in the exercise of their discretion to have made it. I think this is a case in which they probably ought to have done so; the truth here would perhaps be better got at before an official referee than before a jury. The appeal must be allowed.

BAGGALLAY, L.J. I am of the same opinion. I think the present case falls within the words of s. 57, and that these were

1880

WARD v. PILLEY.

accounts requiring a prolonged examination. What then ought we to do under the circumstances of the case? If the judges in the Court below had refused to make the order on the ground of want of jurisdiction, and said no more, I should have had some doubt what we ought to say here. But they let fall strong expressions of opinion as to what they would have done if they had had jurisdiction, and I think we must take it that they would have been prepared to make the order but for the supposed want of jurisdiction. And both the Master and Lindley, J., thought the case was one in which they in their discretion ought to make the order. Under these circumstances I think the decision of the Queen's Bench Division ought to be reversed.

BRETT, L.J. In this case the master made an order referring all the issues in the action to an official referee, and what we have to determine is whether he was right.

There are here three questions to be considered. The first question is whether, assuming that the case comes within s. 57, the summons to refer was taken out too late, not having been taken out within the time limited by Order XXXVI., rule 5. But, in my opinion, that rule does not apply to cases of references under s. 57. The rule speaks of the party "desiring to have the action tried," &c. But an action cannot be tried before an official referee, only issues can be referred to him. On this point the respondent relied on the case of *Lascelles* v. *Butt*. (1) But that case was decided before *Longman* v. *East* (2), in which it was held that an action could not be referred to an official referee at all. The former case must therefore now be regarded as obsolete.

The second question is whether the case is within s. 57? Now this is an action on a builder's bill, an account containing many items, and these items must in some sense be examined. But that is not enough. In order to give the Court jurisdiction to refer to an official referee, the examination which these accounts will require must be a prolonged one. Now every item in this bill may be disputed, and probably will be so. But if the judge to whom the application to refer is made finds that every item will probably be disputed at the trial, he will not unreasonably

(1) 2 Ch. D. 588. (2) 3 C. P. D. 142.

1880

WARD v. PILLEY.

come to the conclusion that the examination of these items will be a prolonged one, and one which cannot be conveniently made before a jury. The decisions under s. 3 of the Common Law Procedure Act, 1854, indicate what is the proper construction to be put on the section before us.

Then comes the third question. In cases within s. 57 what is it that the Court is empowered to refer? I am of opinion that if a case is once brought within that section, the Court may send to the official referee not only the issues of account but all the issues in the cause. Here then the Court had a discretion to order all the issues in the action to be referred. But they did not exercise their discretion at all. The case therefore must stand upon what was done in the matter of discretion by the master and Lindley, J. They both thought that under the circumstances all the issues ought to be referred. They did exercise their discretion, and with that discretion I think we ought not to interfere.

Judgment for the defendant.

Solicitors for plaintiff: *Boxall & Boxall.*
Solicitor for defendant: *Henry Morris.*

[IN THE COURT OF APPEAL.]

April 14.

CHAPMAN *v.* THE MIDLAND RAILWAY COMPANY.

Practice—Costs on Higher Scale—Rules of Supreme Court (Costs), Order VI., rule 2—Injunction when principal Relief sought.

In an action for trespass to land, the plaintiff claimed and obtained an injunction in addition to damages for the trespass. The nature of the trespass complained of did not involve any assertion of title or any injury of a permanent irreparable character. The plaintiff claimed costs on the higher scale under rules of Supreme Court (Costs) Order VI., rule 2.

Held, affirming the judgment of the Queen's Bench Division, that this was not such an action for an injunction as to render the higher scale applicable within the rule.

APPEAL from the judgment of the Queen's Bench Division in in favour of the defendants. (1)

The writ was issued on the 29th of May, 1877. Statement of claim complained that the defendants, in May, 1875, by their

(1) Ante, p. 167.

1880

CHAPMAN v. MIDLAND RAILWAY CO.

contractors, agents, and servants entered upon the plaintiff's land and cut up the surface and broke up the plaintiff's road over the same and deposited materials on the plaintiff's land. The plaintiff claimed 30*l.* damages and an injunction.

The defendants in their defence admitted the trespasses and paid 10*l.* into court. In September, 1877, the plaintiff obtained an injunction to restrain the defendants from further trespassing on the land.

The plaintiff claimed to have his costs taxed on the higher scale under Order VI., rule 2 (Costs). (1)

The facts and the arguments sufficiently appear in the report in the Court below, and in the judgments of this Court.

Wills, Q.C., Cozens Hardy, and *R. S. Wright,* for the plaintiff.
W. G. Harrison, Q.C., and *Sutton,* for the defendants.

BRETT, L.J. The main question is what interpretation are we to put on Order VI., rule 2. I think whatever may be the interpretation of the words "where the procuring of such injunction is the principal relief sought to be obtained," those words govern the preceding part of the rule and are not confined merely to the part which commences "and other similar cases." It follows, therefore, in order that the higher scale of costs may be applied to any particular case, that it must be brought within both branches of the rule. It must be one of the instances in which special injunctions are asked for, and it must also be a case where the procuring of the injunction is the principal relief sought to be obtained. The plaintiff would therefore have to shew that his case is within the first part of the rule. It is said that the act complained of is an injury to property, and therefore the case is within the first part. No suggestion was made during the argument as to the meaning of the words "injury to property:"

(1) Order VI., rule 2 (Costs). Solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "higher scale" in the schedule hereto; in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringements of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed "lower scale" are hereby made applicable.

whether they would comprise the case of a mere trespass where there was no injury in fact to land, or whether it would be necessary beyond the mere trespass there should be some actual injury to the land. It is not necessary in this case to determine that point, because, whether the case is within that first part of the rule or not, we have to determine whether it is not also within the second part. If it be within the first part, yet if it is not also within the second part, then the higher scale ought not to be applied.

It may be that the words "injury to property" do not mean a mere trespass, as for instance, if a person were to walk across another man's land without actually injuring the land, but mean that there must be an actual injury done to the land. Assuming there must be an actual injury, it may well be said in this case that there was something more than a mere trespass, that there was an actual injury by cutting up the land. Although it is unnecessary to determine this point, yet the inclination of my opinion is that there must be something more than a mere trespass to satisfy those words; there must be some actual injury to the land.

The question which we have to determine is what is the meaning of the second part of the rule, assuming that the case is brought within the first part. It was argued by Mr. Wills that this latter phrase ought to be interpreted as if it were written "where the procuring such injunction is a primary as distinguished from an ancillary relief sought to be obtained." First, that interpretation is a very violent change of phraseology, and it would be very difficult to construe the words which are used in rule 2, Order VI., so as to mean the words proposed. If such a construction were to be adopted it would be impossible to find any case within the first part of rule 2 in which there could be an ancillary relief by way of injunction. Mr. Wills in the course of his argument practically admitted, inasmuch as no such case could be found, that the proposed interpretation could not be applied. We ought not, however, to rest the case on Mr. Wills's admission, but we ought to express our opinion on it. I think that, according to the ordinary rules of construction, we cannot adopt so violent a change of language as that proposed, neither

1880

CHAPMAN v. MIDLAND RAILWAY CO.

Brett, L.J.

can we agree with Mr. Wills's reading of rule 2, because no case can be suggested within the first part of the rule where there would be what is called ancillary relief. Mr. Wills then suggested that the second part of rule 2 should be read thus:—where the procuring such injunction is a primary relief sought to be obtained.—By that reading the language is certainly altered, and the language used by the legislature ought not to be changed unless there is some cogent reason that renders it necessary. The general rule is that the words are to be read in their ordinary and usual signification, and it is not a usual mode of expression when it is intended to state "a primary relief" to use the words "the principal relief." Whoever drew rule 2 in using the phraseology "when the procuring such injunction is the principal relief sought to be obtained" assumed that there was more than one relief sought to be obtained. We must assume that the rule deals with the case in which there are at least two reliefs sought to be obtained. If we assume that there are two reliefs sought to be obtained, then the form of phraseology, according to English idiom, certainly implies a comparison between those two forms of relief: and it asserts that one is the principal and the other inferior. Therefore, reading this language according to ordinary English idiom and phraseology I should say that it means, as applied to the case before us, where damages are asked for and also an injunction, that there is a comparison between those two reliefs: and that the question whether the higher scale is to be adopted depends upon a comparison to be made between the two reliefs sought in this particular case, and a determination whether the procuring of the injunction is or is not the principal relief sought to be obtained as compared with the relief sought by way of damages. If it is to be determined by comparison, inasmuch as the question relates to costs, it seems to me that the only person who is to decide that question must be the master.

I also think that rule 3, which seems to be applicable to a case within rule 1, and which empowers this Court or a judge to direct either set of fees to be allowed as to the costs, and therefore leaves no duty on the master but to obey the direction of the Court, is a strong confirmation of the view that the person who is to decide upon the comparison contained in rule 2 is the

master. Therefore, in this case, where damages are sought to be recovered as one mode of relief, and an injunction is also prayed as another, the master will have to determine whether substantially the procuring such injunction or the recovering such damages was the principal relief sought by the party who was asking for both these reliefs. If that be so, there can be no rigid rule by which the master can determine the question. He must determine in each case upon all the circumstances of the particular case: he will not have to consider whether both reliefs are sought, because the rule assumes that both are sought: nor is the question for his determination whether one is frivolous and nominal, but which one of the two is the chief relief that was sought.

It is impossible, as I have already observed, to lay down any rigid rule for the guidance of the master, but there may be many tests which would ordinarily help him to a conclusion. One test is—unless it is met by other considerations in the particular case—whether the party has selected the Common Law Division or the Chancery Division to bring his action. If a person, in such a case as the present, really required, as the principal relief which he seeks, an injunction, I should have thought that the natural course for him would be to apply to the Chancery Division; but if the party seeks to recover damages then it would seem more natural that he should institute proceedings in the Common Law Division. But I guard myself from saying that the test of whether the action was brought in the Common Law Division or the Chancery Division should be decisive. Although the action is brought in the Common Law Division it may from other circumstances appear that the principal relief sought is an injunction; and on the other hand, if the action is brought in the Chancery Division it may appear that damages are the principal relief sought. The master, therefore, must determine upon all the circumstances of each particular case. The decision of the master is subject to revision, and although it is a question which the master must judicially determine, yet if he determines it wrongly it is a subject matter of appeal first to the judge at chambers, and then, under peculiar circumstances, to the Divisional Court, and again, in rare instances, from the Divisional Court to the Court of Appeal.

1880

CHAPMAN v. MIDLAND RAILWAY CO.

Brett, L.J.

Apart from the construction of Order VI., rule 2, the question is, whether the master, whose decision has been supported by Field, J., at chambers, and afterwards by the Divisional Court, has arrived at a wrong conclusion. So far from thinking that the master was wrong, I am of opinion that his decision was right, and even if I were not so strongly of opinion as I am that the master was right, I should be loth to set aside his decision adopted by the judge at chambers and fortified by the judgment of the Divisional Court. It would require an extreme case to induce me to overrule all three decisions.

I am therefore of opinion that the decision of the Queen's Bench Division was correct, and ought to be affirmed.

COTTON, L.J. The question we have to consider is the construction to be put on Order VI., rule 2, relating to costs. That rule applies not to all actions, but only to actions for "special injunctions" in certain specified cases. The word "special" is superfluous, because "special" is used as distinguished from a common injunction, and a common injunction is now a thing of the past. I am of opinion that the words of rule 2, "where the procuring such injunction is the principal relief sought to be obtained," do apply not only to the preceding words, "and other similar cases," but to all the specified actions in which injunctions are sought to be obtained, and I think there is strong ground for this construction. Under the Judicature Acts there may be a joinder of several causes of action, subject only to the right of the judge to order that the causes of action ought not to be joined, and it would be a great evil if by adding to a cause of action a claim for an injunction, the scale at which the costs ought to be taxed should be varied. In order, under rule 2, to bring a case within the higher scale of costs, it must be made out, not only that the subject-matter in respect of which the injunction is sought, comes within those specified in the rule, but also that the injunction is the principal relief sought to be obtained.

It is true that in the first part of rule 2 "trespass" is not mentioned. Until recently, the Court of Chancery did not grant injunctions in case of a trespass, but in this respect the practice has been altered. I think the reason why trespass is not

mentioned is, that although there might be an act which would be sufficient to enable a plaintiff to maintain an action of trespass and recover small damages, yet there would really be no injury to property. A mere trespass would not necessarily be within rule 2, but a trespass occasioning an injury to property would come within it. Then what is the meaning of the words "where the procuring such injunction is the principal relief sought to be obtained." I think we ought not to change the words "the principal relief," into "a principal relief." We ought not to construe it to mean a primary relief sought. That is to say a relief not ancillary to something else but really in itself giving to the plaintiff something which he would not get unless the injunction were granted; such a construction would alter the language and by giving the words a different sense it would make a different rule. To illustrate my meaning of the words principal relief sought, where there is a claim for something besides the injunction, I will suppose the case where trees were being cut down; and I will suppose some two or three had been cut down under circumstances which shewed an intention to cut down an entire plantation which it was of importance to preserve. There the action would seek damages for the trees already cut down and would pray an injunction to prevent the much greater mischief, namely, the cutting down of the whole plantation. No one would hesitate to say in that case that the principal relief sought was to restrain the entire destruction of the plantation; a small portion of which had already been destroyed, under circumstances which would give the plaintiff a claim for damages. I will give one other instance, an act may have been done which being within this rule might give the plaintiff a claim for damages; but it might be an act of such a nature, as if it were continued would be of the greatest injury to the enjoyment of the property, no amount of damages for which would be adequate, because it might interfere with its enjoyment in such a way that the law does not recognise. Take the case of an interference with the enjoyment of a view; the thing itself might be one the continuance even of which might entitle a person only to small damages; but its continuance, unless restrained by injunction, might cause the greatest annoyance; there it might be said the injunction was

1880

CHAPMAN v. MIDLAND RAILWAY CO.

Cotton, L.J.

the principal object. I give these only as instances, but not as confining the rule to such cases.

I will now, deal with the present case; first, who is to decide whether the relief sought is the principal relief or not: I am of opinion that this is the duty of the taxing-master, because it is upon the taxation of costs that the master is to determine the question, having regard to all the circumstances of the case, whether it is or not the principal relief sought. It is not for the judge; the judge may, although he does not consider the injunction the principal relief sought, but that damages are the principal relief, direct the taxation to be upon the higher scale because the action may have been brought to try a right. And he may do so also where although the injunction is the principal relief sought, yet the action is not one of those specified in the first part of rule 2. In the present case the acts done by the company are acts which are an injury to property. The case is brought within the terms of rule 2; but the Court of Chancery always did, and the High Court of Justice ought now to interfere by injunction where a public company purporting to act under the powers given to them by statute are acting either in excess of those powers or without complying with the requirements of their Act. In such cases it may be right for the judge or the Court to say notwithstanding that the case does not fall within rule 2, it is a case in which under the special circumstances the plaintiff ought to have his costs taxed on the higher scale.

I have already said that I think the case is within Order VI., rule 2, and I have to consider the question whether the injunction is the principal relief sought. I agree in the conclusion at which the master has arrived. I however differ from the grounds upon which he has proceeded, for with the exception of the fact that the solicitor for the plaintiff paid the fees on the lower scale to which I attach no importance, he relies on the ground that substantial damages were sought in the action. I think that is not sufficient ground for holding that injunction is not the principal relief sought; because in the case to which I have referred, of a person cutting down trees, if a dozen trees had been cut down the action would have been for substantial damages, but if the intention of the person was to cut down the whole of the

ornamental timber, or the whole of the plantation, which he had no right to do, no one would hesitate in coming to the conclusion that although substantial damages were sought in the action, in respect to the wrong and damage done, yet the injunction was the principal relief sought. I cannot, therefore, agree with the reasons the master has given. I think the injunction is not the principal relief sought, because on the whole of the evidence, the fair conclusion is that the acts of the railway company were done only for a temporary purpose, those acts shewed an intention on their part temporarily to use the land for their purposes. We must also look to the conduct of the plaintiff, the acts of the railway company had been going on for two years, that would not disentitle the plaintiff to an injunction on the hearing of the cause; but I think it is a strong fact in considering whether the principal relief he sought by his action was damages or an injunction. If the interference with his property was of such a nature that injunction was the principal remedy sought, one would expect that the plaintiff would come to the Court as soon as the acts complained of commenced. Certainly that he would not delay for a period of two years. Further, the railway company were not interfering with any residential property, but simply interfering with his means of making a profit by his farm. It is therefore the damage he sustains that he is especially complaining of; and when at the end of two years, he brings an action for that which on the evidence is only a temporary interference with his rights, I think the fair conclusion to arrive at is, that not an injunction, but damages for the wrong sustained, was the principal relief he sought in the action.

I will only add that, although the master is in the first instance the person to decide this question, his decision is open to review. I think the judgment of the Queen's Bench Division is right and the appeal ought to be dismissed.

THESIGER, L.J. The question for our decision is whether the plaintiff is entitled to have his costs taxed on the higher scale under the provisions of Order VI., rule 2, relating to costs. The construction of that rule is not plain, and it may be difficult to

1880

CHAPMAN v. MIDLAND RAILWAY CO.

Thesiger, L.J.

give any general definition which would cover all possible cases under it, but it is not difficult to say what is its general meaning, and I feel no hesitation at coming to the conclusion that the present case is not within it.

In order to arrive at the meaning of rule 2 it is important to ascertain what was the state of the law as to the scale of costs allowed, both in the Court of Chancery and in the Common Law Courts, prior to the passing of the Judicature Acts. In the Court of Chancery there were two scales of costs; one was called the higher scale, but might also have been called the ordinary scale: the other called the lower scale, which was an exceptional scale relating to certain particular suits in the Court of Chancery which are specified in the regulations as to fees of 1860. In the Common Law Courts there were also two scales of costs, also called the higher and the lower scale; one relating to cases where the sum claimed was above, the other to cases where the sum claimed was under 20*l*. There being two scales of costs in each of the two Courts, it appears that the higher or ordinary scale in the Chancery Court was a higher scale than the higher of the two scales in the Common Law Courts; and I think it is important to bear this in mind. Under the Common Law Procedure Act, 1854, s. 79, a power was given to the Common Law Courts to exercise jurisdiction in actions where claims for injunctions were made, and the wording of that section was wide enough to include cases in which the injunction was the principal relief sought, and which would naturally have gone to the Court of Chancery. The power, however, conferred by the Common Law Procedure Act, 1854, was not put into practice to any extent, but was exercised only in cases where damages were the principal relief claimed, and where, if I may adopt an expression used during the argument, the injunction was ancillary to that relief. That being the state of the law prior to the passing of the Judicature Acts, two scales of costs are given under those Acts, applicable to all the divisions of the High Court of Justice, and in Order VI., rule 2 there is a provision that in certain cases the higher scale should be adopted. It is important to see what is the character of these two scales provided by the Judicature Acts.

They cannot be said to be identical with either the higher scale in Chancery or the higher scale at Common Law before those Acts, because the alterations in the character of the writs, of the pleadings, and other proceedings in the actions made some change as to costs to be taxed in them necessary; but I am informed by the master that substantially the higher scale under the Judicature Acts corresponds with the higher scale formerly allowed in the Court of Chancery, and the lower scale with that in the Common Law Courts.

I will now proceed to ascertain the meaning of rule 2. It provides that, subject to two conditions, the higher scale in certain cases should be allowed. One condition is as to the nature of the action in which the injunction is sought to be obtained, the other —because I treat the condition as applicable to all the actions mentioned in the first part of the rule—relates to the nature of the relief sought in that particular action. I will not attempt a definition which will cover the particular actions which are comprised in the first part of that rule, but I am inclined to think that a trespass upon land where there is a substantial injury to property would be one of the actions mentioned in it. It is unnecessary to decide that point in the present case, for, assuming it to be an action for injury to property, the question remains is it an action where the procuring such injunction is the principal relief sought to be obtained? Mr. Wills has given up the argument which he at one time addressed to us, as to the distinction between primary and ancillary injunctions; but his contention is that the words "the principal relief" do not mean what in their natural and grammatical signification they would mean, but the meaning to be given to them ought to be "the principal or primary remedy sought in the action." I cannot agree with that view. The words are plain and intelligible, and bearing in mind the position of things before the passing of the Judicature Acts, I think there is good reason why they should receive their natural and ordinary construction. It may be difficult in all cases to say which is the principal relief sought in an action where damages as well as an injunction are sought, but I cannot think that in practice that difficulty will often occur. It is unnecessary to specify

1880

CHAPMAN v. MIDLAND RAILWAY CO.

Thesiger, L.J.

the particular classes of cases in which an injunction would be obviously the principal relief, and the classes of cases in which damages would be the principal relief; but at the same time any person who has any experience in the law courts, when the particular case comes before him, can very well tell which is the principal relief sought. Is or is not the principal relief in this action the injunction? I will assume that there has been an injury to property and that the action is one of those specified in the earlier part of the rule. But how did that injury to property arise? The railway company, under their compulsory powers, have taken certain land and occupied it. They required to carry certain materials over land in the possession of the plaintiff, and not taken by them for the construction of the railway. I think, looking at the conduct of the railway company, it is clear that they did not bring themselves—apart from any question of notice—within the provisions of the Railway Clauses Act. They did not take any road in the sense in which that term is used in s. 30 of that Act, because no hard or gravelled road was taken by them. They did not take any land temporarily for the purpose of depositing spoil, or for the purpose of making a road to their line, or to land taken by them for their line under s. 32. What the company were desirous of doing was to avoid the expense of temporarily taking the land, and yet to get the benefit of the plaintiff's land, but obviously only temporarily. I think the true inference to be drawn from the facts stated upon the affidavits is, that, provided the plaintiff got full payment for the damage that might be done to his land by the temporary occupation of the company, he was content to allow them to have it; and that when the plaintiff brought his action, although under the Judicature Acts it was to be expected that he would claim an injunction, his real claim or the principal relief he sought was for damages. I agree with Brett, L.J., in thinking that the fact of the plaintiff having brought his action in the Common Law Division in some measure shews that his claim was principally for damages. I do not say that that is necessarily a test, because the plaintiff might undoubtedly bring his action in the Common Law Division although the principal relief sought was an injunction, but as a matter of

fact we know that as it was before the Judicature Acts so it is now, where the injunction is the principal relief sought the action is as a general rule brought in the Chancery Division of the High Court. Then we further find that the plaintiff is not claiming merely nominal damages, and asking for an injunction because he alleges the defendants are doing him a damage which cannot be compensated in money. On the contrary he asks for substantial damages, no interim injunction is prayed for, he allows the matter to sleep for a considerable time, and it is not until after the payment of money into court, and there has been an admission of the plaintiff's right, that the claim for the injunction is pressed and is granted. Although these facts are not conclusive yet they are elements to be taken into consideration. Then there is another circumstance which must not be omitted. The plaintiff was anxious that the action should be tried in the county court.

On all the facts of this case I think the action was brought for damages, and this appears more clearly when we consider that the occupation of the land by the company was not permanent, was not enjoyed under any claim of right, but was a temporary occupation for a temporary purpose without any assertion of right on their part, and which practically ceased shortly after the action was commenced.

Judgment affirmed.

Solicitors for plaintiff: *Lousada & Emanuel.*

Solicitors for defendants: *Beale, Marigold, Beale, & Groves.*

1880
March 16.

[IN THE COURT OF APPEAL.]

BURNS *v.* NOWELL.

Kidnapping Act, 1872 (35 & 36 *Vict. c.* 19), *ss.* 3, 6, 9, 16, 20—*Seizure of Vessel by Naval Officer—Bonâ fide Belief—Reasonable Suspicion that Offence committed against the Statute.*

By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be felony; by s. 16, any vessel suspected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the Act.

Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man-of-war, of which the defendant was commander; at the time of the seizure the defendant bonâ fide believed that there was reasonable ground for suspecting that an offence had been committed against the Act:—

Held, no action would lie against the defendant.

ACTION by the plaintiff, the owner of the brig *Aurora*, to recover damages from the defendant, an officer commanding her Majesty's ship *Sandfly*, for wrongfully seizing and detaining the *Aurora* upon a charge of having committed an offence against the Kidnapping Act, 1872 (1) (35 & 36 Vict. c. 19).

At the trial before Lord Coleridge, C.J., at the Michaelmas Sittings, 1878, the following facts were proved. The plaintiff who is a shipowner, prior to the year 1871, carried on business at Sydney in New South Wales, and was at that time the owner of the *Aurora*, a vessel then engaged in the South Sea Island trade. Vessels engaged in this trade are despatched from Sydney towards the end of the year, and are employed cruising among the different groups of islands in the South Pacific Ocean collecting tortoise shell, coprah, and other island produce, and in fishing for bèche de mer; natives from these islands are hired, and

(1) The title of this Act has been altered by 38 & 39 Vict. c. 51, to "The Pacific Islanders Protection Act, 1872."

employed in diving for this produce, which is a kind of sea-slug inhabiting the bottom of the sea. As soon as a full cargo of bèche de mer and other merchandize has been secured, and the natives landed at their homes in the islands, the vessels return to Sydney. On the 29th of November, 1871, some months before the passing of the Kidnapping Act, 1872, the *Aurora* left Sydney on one of her usual voyages and proceeded to the Solomon Islands. At Simbo and Guadalcanal, two islands of this group, about January, 1872, the master of the *Aurora* engaged eleven natives of those islands to serve, as he alleged, as part of the ship's crew, and to assist in fishing for bèche de mer during the voyage, at a certain rate of pay, and upon the terms that the natives so employed should, as he alleged, at the conclusion of the voyage, but at a period of six months, as the natives alleged, be landed at the respective islands where they had their homes. The *Aurora* then sailed from Simbo, and about September, 1872, arrived at the Duke of York Island, the farthest limit of her voyage, and then sailed among the islands of New Hebrides group, and after she had obtained the produce she required, she proceeded to the Solomon Islands, where, at Guadalcanal, she landed the natives she had taken from that island, and was proceeding to Simbo for a like purpose when she met with a vessel engaged in the same trade, and from the master of that vessel for the first time heard of the passing of the Kidnapping Act, 1872. On the 30th of August, 1873, about four miles from the island of Simbo the *Aurora* fell in with the *Sandfly*, commanded by the defendant, who sent his first lieutenant and a warrant officer on board, who made a report that the *Aurora* had natives on board without any licence to carry them as required by the Kidnapping Act, 1872; and that the natives were not borne on the the ship's articles as part of her crew. The defendant thereupon detained the *Aurora*, and sent the gunner and some men to take possession of her. The reasons given by the defendant for seizing the *Aurora* were, first, that she had natives labourers on board without a licence; secondly, that she employed natives labourers on board without a licence; thirdly, that the natives were unanimous in stating that they were detained against their will on board.

The *Aurora* by orders of the defendant was proceeding to

1880

BURNS v. NOWELL.

Sydney for adjudication, but from stress of weather was obliged to put into Cleveland Bay in the colony of Queensland and within the jurisdiction of the Vice-Admiralty Court of Brisbane. She was then found to be so damaged as to be unable to further prosecute her voyage, her cargo was, therefore, transhipped and taken to Sydney. A suit was afterwards instituted in the Vice-Admiralty Court at Sydney, but the Court decided that they had no jurisdiction in the matter, and the ship and her cargo were restored to the plaintiff.

On these facts Lord Coleridge, C.J., ruled that the only question for the jury was, whether at the time of the seizure and detention the defendant had reasonable grounds for suspecting that the *Aurora* was employed in contravention of either the 3rd or 9th sections of the 35 & 36 Vict. c. 19? This question being left to them the jury answered it in the affirmative. Lord Coleridge, C.J., directed the verdict to be entered for the defendant.

Dec. 12. The Queen's Bench Division granted a rule nisi for a new trial on the ground of misdirection, and of the verdict being against the weight of evidence. On the 11th of June, 1879, after argument, the rule was discharged.

The plaintiff appealed.

March 8 and 9. *Wills, Q.C.*, and *Edwyn Jones*, for the plaintiff. The facts shew that the Act is not applicable to this case. At the time the natives were taken on board in January, 1872, the Act had not been passed. The master of the *Aurora* never heard of it until his voyage in search a cargo was at an end, and after he had landed some of the natives at their homes and was bringing back the others to Simbo. The legislature never intended to interfere with the South Sea Island trade legitimately carried on, nor to apply the Act to cases where natives had been engaged to serve on board ship as part of the crew, and had been detained longer than they wished. Its object was to prevent the kidnapping of natives as pointed out in its preamble. Sect. 3 prohibits the carrying of native labourers, not being part of the crew, without a licence. At the time the natives were shipped it would have

been impossible for the master to have obtained a licence to carry them or to have complied with the requisites of the Act: and, further, the form of the licence under schedule B. is to carry natives labourers from one place to another, and has no reference to the employment of natives on board ship or in the South Sea trade. The Act of 1872 has been amended by the Act of 1875 (38 & 39 Vict. c. 51) but the later Act had not been passed at the time of the seizure. These natives were taken on board as part of the ship's crew, they are as much part of the crew as men serving on board a whaler. It is not necessary that they should have been borne on the ship's articles. The agreement the master makes with a seaman is regulated by the Merchant Shipping Act. Such agreements made in a colony are to be entered into before a shipping master or certain official persons, but only where such persons are to be found: it is not illegal to ship a sailor or a person as one of the crew of a ship without signing the ship's articles in a place where it is impossible to comply with the regulations of the Merchant Shipping Act. Whether these natives were part of the crew was a question which ought to have been left to the jury. No offence has been committed under s. 9; that section, from the heavy punishment inflicted on a person guilty of its infringment, is directed against the forcible removal of natives from one place to another. The gist of the offence is the importing or removing of natives from one place to another, and all the acts made offences in the sub-sections must be acts done with this intention. The offence is felony, and the punishment most severe. It is said that an offence has been committed under sub-s. 2 of s. 9; that the defendant has detained natives on board his vessel without their consent; but to make the defendant's act an offence under sub-s. 2 the detention must be "for the purpose aforesaid," that is a detention "for the purpose of removing such natives into any island or place other than that in which he was at the time of the commission of the offence." It cannot be pretended on these facts that any such offence was committed by the master of the *Aurora*. By s. 16, a naval officer is authorized to seize and bring in for adjudication before a Vice-Admiralty Court any British vessel which shall on reasonable grounds be suspected of infringing s. 9 of the Act;

1880

BURNS v. NOWELL.

and by s. 20, subject to the provisions of the Act providing for the award of damages in certain cases in respect of the seizure and detention of a vessel by the Vice-Admiralty Court, no officer shall be responsible, either civilly or criminally, in respect of the seizure and detention of any vessel in pursuance of the Act. The defendant to bring himself within the protection of the Act must bonâ fide believe in the existence of such a state of things, which, if it had existed, would justify the seizure: *Roberts* v. *Orchard* (1); *Chamberlain* v. *King*. (2) Therefore the act which the defendant is suspected of having committed must be an actual offence against the statute, but the voyage on which the plaintiff was engaged had not been rendered illegal by the statute, because, first, the plaintiff's vessel had sailed before the Act had passed; secondly, the plaintiff was not found carrying natives as labourers and passengers as part of the crew, nor were the natives detained on board the vessel for the purpose of being removed from one island to another. The authority given to an officer to detain and seize a vessel committing an offence under s. 3 is conferred by s. 6, but under that section the authority given is to act if the vessel be found committing the offence in question: a suspicion that she may be found committing the offence of carrying native labourers, not being part of her crew, without a licence is not made in that section a ground of detention. The power of detention upon reasonable suspicion is confined to the offences mentioned in s. 9. It was essential, therefore, that the question, whether the natives who were being carried were or were not part of the crew, should have been left to the jury. The powers of seizing a vessel are merely ancillary to bringing her to a Court, which would adjudicate upon her; if the defendant by his act has brought her to a wrong jurisdiction, he has not brought her to a Court to be adjudicated upon. A naval officer seizing a vessel must bring her into an Admiralty Court for effective adjudication. If the vessel had gone to Brisbane and had been condemned s. 20 might have applied, for the defendant then would have acted in pursuance of the Act. But in the present case the defendant is not entitled to ts protection.

[BRAMWELL, L.J. I think that the word "crew" in s. 3 of the

(1) 2 H. & C. 769; 33 L. J. (Ex.) 65. (2) Law Rep. 6 C. P. 474.

Act of 1872 means the sailing crew or ordinary crew of a vessel. It seems to me that the defendant was justified in detaining the *Aurora* if he believed that he had reasonable grounds for suspecting that she had been engaged upon an illegal voyage: sect. 20 provides that no damages shall be recovered, and no officer shall be responsible in respect of the seizure or detention of any vessel in pursuance of the Act: that section must go beyond s. 16: and it follows that an officer is liable only where a seizure is made without reasonable suspicion. The cases cited relate only to notice of action.]

Staveley Hill, Q.C., for the defendant. The legislature have imposed by statute a duty upon the defendant; and the rule is that when a public officer endeavours to discharge a duty which he is bound by law to fulfil, he is to be protected from legal process, even although he mistakes the nature of the duty cast upon him, and thereby inflicts an injury upon the Queen's subjects. This doctrine has been often applied in the case of surveyors of highways. *Smith* v. *Hopper* (1); *Hardwick* v. *Moss* (2); *Selmes* v. *Judge*. (3)

Wills, Q.C., was not heard in reply.

Cur. adv. vult.

March 16. The judgment of the Court (Bramwell, Baggallay, and Thesiger, L.JJ.), was delivered by

BAGGALLAY, L.J. It is not in our opinion, necessary for the decision of this appeal, to determine whether the schooner *Aurora* was, at the time of her seizure by the defendant, employed in the commission of any of the acts which are made offences by "the Kidnapping Act, 1872;" for it appears to us that, even upon the assumption that no such offence had been committed, the defendant cannot be held responsible to the plaintiff in respect of the seizure and detention of the vessel, and that this appeal must consequently be dismissed.

We will presently express our opinion upon the question, whether any such offence had in fact been committed, as we deem it only

(1) 9 Q. B. 1005; 16 L. J. (Q.B.) 93.

(2) 7 H. & N. 136; 31 L. J. (Ex.) 205.

(3) Law Rep. 6 Q. B. 724.

1880

[BURNS v. NOWELL.

fair to the plaintiff, as the owner of *Aurora*, and Captain Bennett, her master, that we should do so; but we propose, in the first place, to consider the nature and extent of the protection afforded by the Act to those commanding officers of her Majesty's ships, who, in the discharge of their duties, seize and detain vessels suspected of being employed in the commission of such offences.

Sect. 16 of the Act authorizes any commissioned naval officer on full pay to detain, seize, and bring in for adjudication before a Vice-Admiralty Court any British vessel, which shall upon reasonable grounds be suspected of being employed in the commission of any of the offences enumerated in s. 9 of the Act; and by s. 6 this provision is made applicable to any British vessel, which shall be found carrying native labourers in contravention of the provisions of s. 3; and by s. 20 it is provided that no officer shall be responsible either civilly or criminally in respect of the seizure or detention of any vessel in pursuance of the Act.

The first question, then, which we have to consider is what meaning should be attributed to the words "shall upon reasonable grounds be suspected," as used in s. 16 of the Act, and "in pursuance of the Act" as used in s. 20.

It has been contended by Mr. Wills, on behalf of the plaintiff, that an officer detaining or seizing a vessel, cannot properly be considered either as having reasonable grounds to suspect that an offence has been committed, or as acting in pursuance of the Act, unless he believes in the existence of facts which if they did actually exist, would be sufficient to establish the commission of the offence; and, in support of this contention he has referred to decisions and dicta in cases in which notice of intended action having been required by law to be given to persons sought to be made responsible for having exceeded their powers, questions have arisen as to the circumstances under which such persons are entitled to notice.

We are, however, unable to accede to the argument based upon the supposed authority of these cases. We do not doubt their value as guides for the decision of cases of a similar character, but the words, which we have now to interpret, are contained in a statute of a very special character, and their true meaning can only be arrived at by a consideration of the general scope of the

statute and of the circumstances under which, and the purposes for which, it was avowedly passed. To adopt the limited construction, contended for by Mr. Wills, would render the Act almost a dead letter; the practical effect of so doing would be to make the justification of the officer depend, in almost every case, upon the offence having been in fact committed; and he would consequently have to discharge his duty at the risk of being held responsible in damages, should he make a mistake in applying a newly made law to a state of facts, believed or suspected by him to exist, but as to the existence of which he can, speaking generally, have but very slight means of informing himself. We cannot suppose that the legislature intended to place an officer, upon whom it imposed duties of so important and so responsible a character, in a position of such risk and peril. In our opinion an officer should be considered to have had reasonable grounds for suspicion, if at the time of the seizure, he reasonably believed in the existence of a state of circumstances which, in his honestly formed opinion, amounted to the commission of an offence under the Act. And the view of the interpretation which should be adopted is supported, not only by the general terms in which s. 20 is expressed, but also by the provisions contained in ss. 18 and 19 for making compensation to those who may suffer by reason of an improper seizure or detention; and though it may be urged, and perhaps with some justice, that the compensation so provided is not adequate to meet all the cases which may arise, in which justice would appear to require that compensation should be made, the fact that any such compensation is provided, strongly supports the view it was not intended by the legislature that the officer should remain liable for the consequences flowing from an honestly intended discharge of his duty.

From the evidence in this case it is clear, and it is not disputed, that the defendant believed, and with good reason, in the existence of a state of circumstances which in his opinion, not only authorized him to seize the *Aurora*, but imposed it upon him as a duty to do so, and such being the case he was, in our opinion, fully justified in seizing and detaining her.

It is, however, necessary to notice another point raised on behalf of the plaintiff, which was to this effect: that it was the duty of

1880

BURNS v. NOWELL.

the defendant to have taken the *Aurora* and her cargo before a Court of competent jurisdiction for adjudication; that, had this course been adopted, it would have been within the power of the Court to have done justice to the plaintiff by restoring both ship and cargo and by awarding him damages for the seizure and detention; that in consequence of the proceedings having been instituted in the Vice-Admiralty Court at Sydney, to which port the cargo had been forwarded, though the vessel had been left in Cleveland Bay, within the jurisdiction of the Brisbane Court of Queensland, the proceedings had been rendered nugatory, the judge having decided that the Court at Sydney had no jurisdiction in the matter; and that for this alleged neglect of duty, and the consequent loss to the plaintiff, the defendant was liable in damages.

Now, with reference to this claim, we think it is sufficient to say that no such claim is put forward by the pleadings; but, apart from this omission, which might perhaps be removed by amendment, if the circumstances would justify an amendment, it is to us clear that the transshipment of the cargo and the sending it to Sydney, whilst the ship was left in Cleveland Bay, was an arrangement acquiesced in, if not suggested by the plaintiff, or those who acted on his behalf. It is also to be observed that we have no evidence before us to shew with whom the responsibility rested of instituting proceedings in a Vice-Admiralty Court, or as to whether the defendant had anything to do with it. Being then of opinion, for the reasons which we have stated, that the defendant cannot be held responsible for the seizure of the *Aurora*, we proceed to consider whether at the time of her seizure she was employed in the commission of any offence within the intent and meaning of the Kidnapping Act, 1872.

As regards the offence alleged to have been committed (by an acting in contravention of the provisions of s. 3 of the Act, 1872), we should have been prepared to express a confident opinion that no such offence had been committed if the answer to the question had depended upon the construction of that section alone, apart from any considerations arising out of the provisions of the subsequent Act of 1875. The form of licence given in schedule B. to the earlier Act points to the carriage of native labourers, as

passengers from one place to another and is not, as is recognized in the Act of 1875, applicable to such an employment of native labourers as that in which the natives on board the *Aurora* were engaged; and there was in our opinion much force in the argument of Mr. Wills, that the natives on board the *Aurora* were part of the crew of that vessel.

But the Act of 1875 is to be construed as one with the earlier statute; and reading the two together we think that the reasonable conclusion is that to carry native labourers without a licence for the purpose of their being employed in the manner in which the natives shipped on board the *Aurora* were in fact employed is constituted an offence within the meaning of s. 3 of the Act of 1872, and that this must be considered to have been the true construction of the section, not only as from the time when the later Act was passed, but from the time when the earlier Act came into operation.

But the question remains whether having regard to the fact that all the natives who were on board the *Aurora* at the time of her seizure had been shipped some months before the Act of 1872 was passed, and to the other circumstances, which we shall presently mention, there was a carrying by that vessel within the meaning of s. 3.

The form of licence, given in schedule B to the Act of 1872, purports to license the vessel to carry a limited number of native passengers from one specified place to another within a limited space of time, and the form given in Schedule B to the Act of 1875 purports to license the vessel to employ a limited number of native labourers from one specific date to another, so that the carrying in the one case and the employment in the other has a specified commencement and a specified termination. Now, inasmuch as the carrying of the native labourers on board the *Aurora* commenced before the Act of 1872 was passed, a licence for the commencement of such carrying was not only not necessary but could not have been obtained; and the subsequent carrying of the natives until they were removed from the *Aurora* upon her seizure by the defendant was a continuous proceeding, during which the vessel was never within the jurisdiction of the governor of any Australian colony or consular officer competent to grant a licence.

1880

BURNS v. NOWELL.

Under these circumstances we should be disposed to hold that the carrying of these natives on board the *Aurora*, inasmuch as it commenced before the Act came into operation, was not a carrying within the meaning of s. 3, even when viewed with the additional light thrown upon it by the Act of 1875. It may, however, be suggested that the carrying, though not unlawful in its commencement, became so when the Act came into operation, notwithstanding the ignorance of the master that any such Act was in force, and though it was then out of his power to obtain a licence. But before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued. Now, the natives who were on board the *Aurora* had been shipped by Captain Bennett under agreements by which he was bound to take them back at the end of their service to the several islands from which they had embarked; and at the time when he first became aware that the act of 1872 was in force, he had completed his voyage so far as its fishing and other trade purposes were concerned, and was on his way to land the natives in pursuance of his agreement with them, and then to proceed to Sydney; and to this it must be added that when the *Aurora* was seized, which was but a few days after Captain Bennett had first heard of the Act being enforced, he had already landed some of the natives and was within a few miles of the island of Simbo, at which and at other islands of the Solomon group he was about to land all that he had on board.

It appears to us impossible to suggest any course more proper for Captain Bennett to have adopted than that which he did adopt, though he probably adopted it as in accordance with his usual practice on such voyages, and not for the purpose of avoiding the commission of an illegal act, as he does not appear to have

had any clear idea of the provisions of the Act of 1872 until informed of them by the defendant.

Had he put the natives on shore at the island nearest to him at the time when he first heard of the Kidnapping Act, he would not only have broken his contract with them, but would have been guilty of an act of cruelty in all probability as great as any which it was the avowed object of the Act to prevent.

For these reasons we have come to the conclusion that the carrying of the native labourers on board the *Aurora* was not, under the circumstances to which we have referred, a carrying within the intent and meaning of the 3rd section of the Act of 1872, and that consequently that the *Aurora* was not at the time of her seizure employed in the commission of any offence within such intent and meaning. With reference to the suggested commissions of some one or more of the offences enumerated in s. 9 we have but few remarks to make. It appears to us sufficient to refer to the several circumstances to which we have already drawn attention to negative the existence on the part of the plaintiff or of Captain Bennett, or of any other person for whose acts the plaintiff can be held responsible of any such purpose as is contemplated by s. 9, and is essential to the constitution of the several offences therein enumerated.

Our judgment proceeds on this, that the defendant acted in pursuance of the statute, bonâ fide believing that there was reasonable cause of suspecting that an offence under it had been committed, and that it was his duty to do what he did.

Judgment affirmed.

Solicitors for plaintiff: *John Mackrell & Co.*
Solicitors for defendant: *Hare & Fell.*

1880
May 28;
July 5.

SAUNDERS, APPELLANT; THE SOUTH EASTERN RAILWAY COMPANY, RESPONDENTS.

By-law—Railway Company—Ultra Vires—Unreasonableness of Penalty—Passenger refusing to shew Ticket—Penalty varying with Distance Train has travelled—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 108, 109.

14 QBD 34

A by-law of the respondents' company provided "that a passenger should shew and deliver up his ticket to any duly authorized servant of the company whenever required to do so for any purpose, and that any person travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid should be required to pay the fare from the station whence the train originally started to the end of his journey." The appellant had a ticket entitling him to travel on the lines of the respondents and the L. and S. W. Railway Company from Charing Cross or Cannon Street to Windsor and back. Having come to the Waterloo Junction station on the respondents' line, where he had to change trains, he had for this purpose to go from the respondents' station to that of the L. and S. W. Railway Company. On passing out of the respondents' station he was asked to shew his ticket but refused to do so. There was no intention to defraud on the appellant's part. The respondents summoned him under the above by-law, and he was convicted in the amount of the fare from the station whence the respondents' train by which he travelled had started:—

Held, that the conviction must be quashed.

By Cockburn, C.J., assuming that the power given by the 108th section of the Railways Clauses Consolidation Act, to make by-laws for "regulating the travelling upon or using and working the railway," applied to persons travelling in the company's carriages, which he was inclined to think it did not, it was not competent to the company by their by-law to make the refusal to shew the ticket an offence in the absence of a fraudulent intention; secondly, the by-law was void for unreasonableness, because the penalties thereunder for offences of equal criminality would vary with the distances from which the train might originally have started; and thirdly, the by-law was inapplicable to the case, as the power to make by-laws was confined to the case of persons travelling on the railway, which the appellant was not doing when required to shew his ticket.

By Lush, J.: The by-law was void for unreasonableness, because the penalty for not shewing the ticket varied according to the distance the train had travelled, and also because the passenger was required not only to shew but to deliver up his ticket whenever required for any purpose.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43. The facts sufficiently appear from the judgments.

May 28. *Tindal Atkinson*, for the appellant. The by-law is unreasonable, and therefore void because the penalty inflicted is fixed by the distance from which the train has travelled, and varies

according to the distance. The offence of refusing to shew a ticket is of the same moral quality whether the train has run a long or a short distance, yet in one case a large, in the other, a small penalty is incurred. All jurisdiction as to the amount of the penalty is taken away from the magistrate who must convict in the amount of the fare from the station whence the train started.

Again, it was essential that the amount of the fare should be specified to the appellant before he could be proceeded against, which was not done. [He cited *London, Brighton, and South Coast Ry. Co.* v. *Watson* (1); *Dearden* v. *Townsend* (2); *Chilton* v. *Croydon Ry. Co.* (3); *Brown* v. *Great Eastern Ry. Co.* (4)]

Cohen, Q.C. (*Warr* and *Bremner*, with him), for the respondents. The present case is not governed by *London, Brighton, and South Coast Ry. Co.* v. *Watson*. (1) That was not a case of wilfully refusing to produce a ticket, but of accidentally travelling without a ticket. It is reasonable that a man who has a ticket and wilfully refuses to produce it, and to shew whence he has come should be liable to pay the fare from the station whence the train started. The penalty is certain on the principle, Id est certum, quod certum reddi potest. If a definite penalty was fixed it might operate harshly in some cases and too leniently in others. No person need incur this penalty who chooses to shew his ticket. The case is not like a case of travelling without a ticket without intention to defraud.

[LUSH, J. The case of *London, Brighton, and South Coast Ry. Co.* v. *Watson* (1) is an authority that the part of the by-law that relates to travelling without a ticket is bad. Can you sever the rest of the by-law from the part held bad where both are mingled together as in this by-law?]

It depends on whether the two parts are in substance several, not on the collocation of the sentences.

Tindal Atkinson, in reply.

Cur. adv. vult.

July 5. The following judgments were delivered:—

COCKBURN, C.J. This is an appeal against the conviction of

(1) 3 C. P. D. 429.
(2) Law Rep. 1 Q. B. 10.
(3) 16 M. & W. 212.
(4) 2 Q. B. D. 406.

1880

SAUNDERS v. SOUTH EASTERN RAILWAY CO.

Cockburn, C.J.

the appellant by a metropolitan police magistrate for breach of a by-law of the respondent company, which by-law is in these terms:—"No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage, and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company, whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

The facts were as follows: The defendant is in the habit of travelling to and fro between London and Windsor. The journey is accomplished by means of two lines of railway—by that of the respondent company, from Cannon Street or Charing Cross, as far as the Waterloo station of the South Western Railway Company, and from thence to Windsor on the line of the latter company. Joint tickets are issued, by arrangement between the two companies, which enable the traveller to travel the whole distance without taking a second ticket. The defendant has been for some time the holder of a season ticket enabling him thus to travel over both lines.

The carriages of the South Eastern Company do not run on to the line of the South Western. On arriving at the junction, the passenger has to alight on, and pass along, a platform belonging to the South Eastern Company, and in doing so has to pass a barrier at which the company have ticket collectors. The defendant had travelled from London by a train of the South Eastern Company which had started from Blackheath. On arriving at the barrier, for the purpose of passing on to the South Western Company's station, he was called upon by the respondents' ticket collector to shew his ticket, but refused to do so. Hereupon the collector said he must charge him the fare from Blackheath; the collector did not, however, demand or mention any specific sum. The appellant refused to pay. The appellant has been convicted by the magistrate in the amount of the fare

from Blackheath, and against this conviction he now appeals. In my opinion the conviction was wrong, and the appeal must prevail.

In the first place, it was held by this Court in *Brown* v. *Great Eastern Ry. Co.* (1), that under such a by-law as the present, assuming such by-law to be otherwise good, there must be a demand of the specific amount payable in respect of the penalty imposed by the by-law, which condition was not satisfied in the present instance. I have, however, considerable doubt whether that decision governs this case, as I gather from the facts stated that, upon the ticket collector informing the appellant that he should charge him the fare from Blackheath, the appellant at once stated that he should not pay it. This fact, which did not exist in the case of *Brown* v. *Great Eastern Ry. Co.* (1), is, I am disposed to think, sufficient to dispense with the necessity of a demand of the specific amount, which, under the circumstances, would have been useless.

But, passing by this point, I am of opinion, first, that the by-law is bad; secondly, that it was inapplicable under the circumstances to the case of the appellant.

As regards the validity of the by-law, I am strongly disposed to think that such a by-law was ultra vires. The power to make by-laws is given by the 108th section of the Railways Clauses Consolidation Act. This section empowers a railway company to make regulations for regulating the use of the railway in certain specified instances; that is to say, for regulating the speed of trains, the times of arrival and departure, the loading and unloading of carriages, the receipt and delivery of goods; and, as regards passengers and others, "for preventing the smoking of tobacco and the commission of any other nuisance, in or upon such carriages, or in any of the stations or premises occupied by the company;" after which follows this more general term, "and generally for regulating the travelling upon or using and working of the railway." I am greatly disposed to think that this enactment has reference to what, at the time the Act was passed, was, as will be remembered, generally contemplated, namely, the use of the railway by other locomotives and carriages than those of the company constructing

(1) 2 Q. B. D. 406.

1880

SAUNDERS v. SOUTH EASTERN RAILWAY CO.

Cockburn, C.J.

the line. I say so because the first four specified purposes, in respect of which power to make regulations and by-laws is given by the section in question, are obviously purposes for which, when a railway company was working its own line, with its own carriages and servants, such power would be wholly unnecessary. A company would need no by-laws to enforce its own orders as to the rate of speed at which its carriages should travel, or the time of their departure and arrival, or as to their loading and unloading, or as to the receipt and delivery of goods conveyed by them. But they might well need such by-laws when their line was worked by persons not under their immediate order and control. The next purpose might no doubt apply either to persons travelling in the carriages of the company or in others. But the last purpose must, as it seems to me, again have reference to the use of other carriages than those of the company. For not only had the case of any fraudulent travelling on the line been provided for by the 103rd and 104th sections, and, assuming s. 109 to be applicable to the case of persons travelling in the company's carriages, any misconduct on the part of such persons had been made capable of being dealt with under a by-law of the company by this very section, but the proviso which immediately follows shows that the words in question had reference to the use of the railway by others than the company, the proviso being as follows: "But no such regulation shall authorize the closing of the railway or prevent the passage of engines or carriages on the railway at reasonable times," a proviso manifestly applicable to other locomotives or carriages, but inapplicable to persons travelling by the company's own trains. And that this is so becomes more apparent from what follows after the enactment enabling the company to make by-laws to enforce its regulations by a penalty to the amount of 5*l.*, viz., that "if the infraction or non-observance of any such by-law or regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate or remove such danger, annoyance, or hindrance, without prejudice to any penalty incurred by the infraction of such by-law." All which, as it seems to me, clearly points to the use of the railway by others. I am therefore led to think that the

power lastly given has no reference to the case of persons travelling by the company's own carriages.

Assuming, however, that the power thus given to make by-laws would enable the company to make a by-law applicable to passengers travelling in the company's carriages otherwise than as expressly mentioned in the 109th section, it again occurs to me to doubt whether the power must not be taken to apply only to cases ejusdem generis with those mentioned specifically in the section. I entertain considerable doubt whether it can involve a power to modify in so essential a degree the contract between the company and a person whom they undertake to carry. The company have a perfect right to say that they will not undertake to carry, and therefore will not admit into their carriages, any one who does not pay his fare beforehand, and take a ticket; and having made this the condition of the contract, they have the right to remove any one from their carriages who has not provided himself with a ticket. And I am not prepared to say that a by-law making it compulsory on a party so circumstanced—that is to say, who has no ticket, or who, having a ticket, refuses to show it—from which it may reasonably be presumed that he has none—to leave a company's carriage, under a penalty if he refuses to leave, would not be a reasonable by-law, and within the power given by the Act. But it seems to me a very different thing to say that where a ticket has actually been taken, and the fare paid, and so a contract has been entered into, a company can, by a by-law, superadd to the contract the important modification that the traveller shall be subject to a penalty if he fails to produce the ticket whenever called upon. If it had been intended to give the company the power of thus modifying the contract in so essential a particular, I should have expected to find it expressly given, either as an appendage to the 103rd section or as part of the 109th.

But there are far more urgent grounds for holding this by-law to be bad. It is found expressly in the case that "the appellant, in refusing to show his ticket, had no intention to defraud, and did not in any way defraud, the South Eastern Railway Company."

In *Dearden* v. *Townsend* (1) this Court intimated a very clear

(1) Law Rep. 1 Q. B. 10.

1880

SAUNDERS v. SOUTH EASTERN RAILWAY CO.

Cockburn, C.J.

opinion that such a by-law as the present could not apply to the case of a person travelling on a railway beyond the distance for which he had taken his ticket and paid the fare, where there was no intention to defraud. And the point was expressly decided to that effect in *London & Brighton Ry. Co.* v. *Watson.* (1) I am perfectly satisfied of the soundness of this construction of the statute.

The principle of these decisions, namely, that the by-law would be bad, if in excess of the 103rd section of the 8 Vict. c. 20, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare, appears to me to apply, a fortiori, to the case of a person who has paid his proper fare, and is travelling with his ticket in his pocket. If the man who is travelling without having paid his fare, and who consequently has no ticket, is not within the by-law, where the element of fraud, required by the statute, is wanting, the man who has paid his fare and got his ticket can surely be in no worse a position.

It may no doubt be said that it is not for travelling without having paid his fare that the appellant has been convicted under the by-law, but for having refused to show his ticket when properly called upon to do so. But when the by-law is looked at—as I think it should be looked at—as a whole, it seems plain that its main and primary purpose is to prevent persons from travelling on the railway in fraud of the company, without having paid the necessary fare, and that the obligation to show the ticket, when required, is subsidiary only to such primary purpose. Indeed, if this were otherwise, and the exhibition of the ticket were not made subsidiary to the prevention of the fraudulent purpose of travelling without paying the fare, this remarkable consequence would follow in the case of such attempted fraud, namely, that in addition to the penalty fixed by the statute, a penalty of forty shillings, and which must have been intended to be the maximum of punishment, the offender might be subjected to the additional penalty established by the by-law—and this to the extent of an additional 5*l.*, that being the amount to which the penalty can be carried by the by-law under s. 109—a result which cannot have been contemplated by the statute.

(1) 3 C. P. D. 429.

It seems to me to follow that, with reference to the exhibition of the ticket, as well as to the travelling without one, the by-law must not be carried beyond the scope of the 103rd section.

Even when confined within these limits, such a by-law, if otherwise within the power to make by-laws given by the statute, will not be without its use. The want of a ticket affords primâ facie evidence of fraud, and entitles the company to put the traveller to the proof of the absence of a fraudulent intention. The refusal to produce a ticket leads in like manner primâ facie to the inference that the party has none, and consequently to the inference of fraud. To this extent a by-law, if not otherwise open to objection, would be reasonable, as subsidiary to the 103rd section of the Act, by affording the company primâ facie evidence of fraud, and so enabling them to proceed against the offender for the penalty under the statute, independently of any civil proceeding to recover the amount of the fare. But otherwise than as subsidiary to the 103rd section the by-law would appear to me to be beyond the power of making by-laws conferred on the company.

It was unnecessary in *Dearden* v. *Townsend* (1) to decide on the validity of the by-law in this respect; nor did the decision involve it. It was sufficient to hold that the case did not come within the by-law, as the by-law imposed a penalty on a party refusing to produce a ticket, it was enough to say that a person not having a ticket and therefore being unable to produce one, could not be said to refuse to do so.

Let us assume, however, that to make a by-law imposing a penalty on a traveller for not showing his ticket, when he has one, would be within the competency of the company; we have still to consider whether this by-law is in itself reasonable.

Now it is settled law, not only that it is essential to the validity of a by-law that it be reasonable (Com. Dig. By-law, C. 6); but also that, "a by-law being entire, if it be unreasonable in any particular, it shall be void for the whole" (Ibid. C. 7), of which Comyns gives as an instance—"as if the penalty be unreasonable." Here the penalty, that of paying the fare from the station from which the train originally started, cannot under certain circumstances be otherwise than unreasonable. For where crimes

(1) Law Rep. 1 Q. B. 10.

1880

SAUNDERS v. SOUTH EASTERN RAILWAY CO.

Cockburn, C.J.

are the same, and the criminality equal, equality of punishment is of the essence of penal legislation and justice. Here, the offence being the same, and the criminality equal, whether the offence occurs at one end of the line or the other, the degree of punishment is made to depend on whether the offence has been committed at the one end or the other, its severity increasing as we advance towards the terminus ad quem. To illustrate this position. Let us suppose a line of sixty miles in length, with stations at every ten miles. The man who, having travelled to the station next to that from which the train started, refuses to produce his ticket, will have to pay the precise fare for the distance he has travelled, in other words, will not have to pay any penalty at all. The man who does the corresponding thing at the further end of the line, that is to say, who travels the last ten miles of the distance, and then fails to produce his ticket, has to pay, in addition to the proper fare for the distance he has travelled, the fare due to the fifty miles over which he has not travelled, as a penalty, while, as we have just seen, the offender at the other end of the line pays no penalty at all. And the same thing occurs—though of course the disproportion is not so striking—in all the other instances which may happen, according to whether the offence occurred nearer to or farther from the terminus a quo. The injustice arising from a law operating thus unequally, and so much more heavily when the offence has been committed at the one end of the line than when it occurs at the other, is too manifest to admit of such a by-law being held to be reasonable.

It is not a sufficient answer to say that it is "reasonable that facility should be thus afforded to the company to protect themselves against persons travelling without having taken tickets, it being in most instances impossible for the company, or their officers, to know far a person may have travelled." Facility is not to be afforded to a prosecutor, or his convenience consulted, at the expense of injustice committed in the inequality of punishment. Besides which the company may to a great extent protect itself by greater care in seeing that no person is admitted into their carriages without showing a ticket.

But, even if we could hold the by-law to be valid, it does not appear to me to be applicable to the case of the appellant.

The power given to the company by the 109th section of the Act is to make by-laws, to be enforced by penalties, for regulating, inter alia, the "travelling upon the railway;" and it is under this power that the by-law in question is made. But, not only must such a power, being in derogation of common right, be construed strictly, but the whole enactment appears to me to point to travelling upon the railway in the actual meaning of the term. Now, here the appellant, when he refused to show his ticket, cannot be said to have been "travelling upon the railway" in point of fact: nor do I think he can be said to have been even constructively travelling upon it. He had entirely left the carriages of the South Eastern Company. He was quitting their station. That the stations of the two companies happen to be more or less contiguous is an accident: they might be some distance apart: as it is, it takes some minutes to pass through the passages which extend from the one platform to the other. It seems to me impossible to say that a person traversing this distance in order to pass on to a different line of railway is still travelling upon the South Eastern line. The by-law, the effect of which must be construed by the light of the statutory power, under and by authority of which it has been made, and beyond which it cannot be carried, is therefore, in my opinion, inapplicable to the case.

On these grounds I am of opinion that the conviction cannot be upheld.

LUSH, J. The question left open at the close of the argument, and upon which we took time to consider our judgment, was the validity of the by-law upon which the magistrate proceeded.

It is in these terms: "No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued.

"Every passenger shall shew and deliver up his ticket (whether a contract or season ticket, or otherwise) to any duly authorized servant of the company when required to do so for any purpose.

"Any passenger travelling without a ticket, or failing or

1880

SAUNDERS v. SOUTH EASTERN RAILWAY CO.

Lush, J.

refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey."

It appears to me that the penal clause of this by-law is ultra vires and void, on the ground that the penalty it imposes for refusing to shew the ticket is variable, and dependent on the accident of the ticket being demanded at an early or a late stage of the train journey. A passenger who has travelled only the last ten miles in a train which has travelled a hundred miles is fined ten times as much as another who started at the station a quo, and whose ticket was demanded at the end of ten miles, although the offence of refusing to shew the ticket is precisely the same in the one case as in the other. A by-law which has this effect cannot be deemed a reasonable by-law.

The clause which precedes the penal clause seems to me equally objectionable; the passenger is not only required to shew his ticket when demanded, a requisition which is perfectly reasonable and which may be enforced by a reasonable penalty, but he is required to "deliver it up," whatever the purpose may be for which it is demanded, and without any limitation as to the time at which the demand is made. A season ticket is a contract by which the company engages to carry the holder, free of any further charge, for a specified period between certain specified stations. Until that period has expired the holder is entitled to retain the ticket as his own property. He is bound to shew it when required, in order that the company's servant may see that it is still in force, and that it entitles the owner to be where he is. The by-law would in terms justify the company in demanding it back on the first journey which the holder makes under it, though it be on the very day the ticket was purchased.

The same objection applies to a journey ticket. The holder of such a ticket is entitled to keep it till he has arrived at the station where the tickets for such a journey are collected.

I do not intend, and am far from wishing to impute to the company that the by-law was framed with a view to its being so applied, or that they would sanction any arbitrary or capricious use of the power which it proposes to give. No instance has ever come to my knowledge in which any company or any official has

1880

SAUNDERS v. SOUTH EASTERN RAILWAY CO.

Lush, J.

shewn a disposition so to act. Our duty, however, is to test it by established principles of law, and regard what the by-law authorizes and not how it is applied in practice, and, so regarding it, I feel bound to hold that on this ground also the penal clauses of it are wholly void.

I do not discuss the validity of that part of the by-law which imposes, as a penalty for travelling without a ticket, the whole fare from the starting station of the train. That point has been already decided by the Common Pleas Division.

I am of opinion, for the reasons given, that the appellant is entitled to our judgment.

Conviction quashed.

Solicitor for appellant: *James Robinson.*

Solicitor for respondents: *W. R. Stevens.*

[IN THE COURT OF APPEAL.]

March 18.

MELLOR, APPELLANT; DENHAM, RESPONDENT.

Practice—Appeal—Criminal Matter—School Board—By-Law—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75) *s.* 74—*Supreme Court of Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

The Court of Appeal has no jurisdiction to hear an appeal from a decision of the High Court of Justice upon a case stated by justices as to an information for contravening the by-laws of a school constituted under the Elementary Education Act, 1874: for the information relates to a criminal matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47.

APPEAL from the judgment of the Queen's Bench Division upon a case stated by justices under 20 & 21 Vict. c. 43. (1)

For the purposes of the present report it is only necessary to state that the justices had dismissed an information preferred by the appellant, the clerk to the Oldham School Board, against the respondent for contravening the by-laws of the school board of the borough of Oldham, by neglecting to cause a child to attend school the whole of the ordinary school hours, as required by the said by-laws. A by-law provided that a parent should pay five shillings if he did not send his child to school. The Queen's Bench Division affirmed the decision of the justices. (1)

(1) 4 Q. B. D. 241.

1880

MELLOR v. DENHAM.

A. L. Smith, and *A. V. Dicey*, for the appellant. The respondent's counsel will contend, as a preliminary objection to the hearing of this appeal, that the information preferred before the justices relates to a criminal offence, and therefore that, owing to the Supreme Court of Judicature Act, 1873, s. 47, (1) no appeal lies from the decision of the High Court of Justice to this Court. It is true that a breach of a by-law of a school board is punishable with a penalty of five shillings under the Elementary Education Act, 1874 (33 & 34 Vict. c. 75), s. 74, and the penalty is by s. 92, to be recovered under 11 & 12 Vict. c. 43; but the mere mode of procedure is insufficient to convert an omission to send a child to school into a criminal offence.

[BRAMWELL, L.J. The objection can hardly be called preliminary: it goes to our jurisdiction.]

Leave to appeal has been granted by the Queen's Bench Division; so that if the information does not relate to a criminal offence, the appeal will lie under the Supreme Court of Judicature Act, 1873, s. 45. The decisions, which may be relied upon for the respondent, are all distinguishable: *Reg.* v. *Steel* (2) was a criminal information for libel; *Reg.* v. *Fletcher* (3) was a conviction for trespass in pursuit of game; *Blake* v. *Beech* (4) was a

(1) By the Supreme Court of Judicature Act (36 & 37 Vict. c. 66), 1873, s. 47, "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of her Majesty's reign."

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, "Any proceeding to enforce any by-law may be taken, and any penalty for the breach of any by-law may be recovered in a summary manner; but no penalty imposed for the breach of any by-law shall exceed such amount as with costs will amount to five shillings for each offence, and such by-laws shall not come into operation until they have been sanctioned by her Majesty in council."

Sect. 92. "Any penalty and any money which under this Act is recoverable summarily, and all proceedings under this Act which may be taken in a summary manner, may be recovered and taken before two justices in manner directed by an Act of the session of the eleventh and twelfth years of the reign of her present Majesty, chapter forty-three, intituled 'An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders,' and the Acts amending the same."

(2) 2 Q. B. D. 37.

(3) 2 Q. B. D. 43.

(4) 2 Ex. D. 335.

conviction for keeping a common gaming house: these were offences of a very different nature from that with which the respondent was charged. The mere fact that a penalty is imposed does not oust the jurisdiction of this Court: *Attorney General* v. *Moore*. (1) The proceeding is essentially of a civil nature. The substance, and not the form, of the proceeding ought to be looked at.

Aspland, for the respondent, was not called upon to argue.

BRAMWELL, L.J. I think that the objection to our jurisdiction cannot be overcome. The argument that has been addressed to us really comes to this, that the offence is so small that it ought not to be deemed a criminal act. That would be an excellent reason why we should not hear the case; for if a criminal offence of a grave character cannot be brought here, it would be strange if we could hear an appeal as to a trifling criminal offence. However, it is clear to my mind that the matter complained of is in truth a criminal offence: for it is disobedience to by-laws, which are enforceable as part of the law of the land, and a person guilty of disobedience to them is liable to a penalty. This is sufficient to constitute a criminal matter, and we have no jurisdiction to hear this appeal.

BAGGALLAY and THESIGER, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellant: *Hare & Fell.*

Solicitors for respondent: *Chester & Co., for Booth, Oldham.*

(1) 3 Ex. D. 276.

1880

April 30.

WADSWORTH *v.* PICKLES.

Bankruptcy—Liquidation by Arrangement—Omission of Creditor's Name from Statement of Debts—Discharge of Debtor—Fraud—Evidence.

A certificate of discharge, obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, is a defence to an action by a creditor whose name has been fraudulently omitted by the debtor from the list of creditors delivered to the registrar, the only remedy of such creditor being to apply to the Court of Bankruptcy to vacate the registration and cancel the certificate.

RULE calling on the plaintiff to shew cause why a judgment of the county court of Yorkshire, holden at Bradford, should not be set aside and entered for the defendant, on the ground that the plaintiff's claim was barred by the debtor's discharge under liquidation proceedings.

It appeared that the action was against the defendant as executrix of W. S. Pickles to recover 68*l.* 4*s.* in respect of a debt of 50*l.* due from the testator, with arrears of interest. The plaintiff stated that in January, 1869, he lent the testator, who was about to be married, 50*l.* In July, 1870, Pickles filed a petition for liquidation, and in the same month a resolution for the arrangement of his affairs was passed by his creditors, and the registrar's order discharging him was duly made, filed, and gazetted. The plaintiff's name was not inserted in the list of creditors filed under the liquidation. In January, 1872, Pickles gave the plaintiff an I. O. U. for the 50*l.*, and again on the 14th of December, 1877, another I. O. U. for 62*l.*, stated to be 50*l.* and interest. The plaintiff alleged that in 1872 the debtor informed him of the liquidation proceedings, and that on his threatening to disclose the debt to the debtor's father-in-law, the debtor gave him the I. O. U. before mentioned. In March, 1879, the debtor died.

The judge, after hearing the evidence, found that Pickles omitted from his list of creditors the name of the plaintiff fraudulently, and gave a verdict for the amount claimed.

Forbes, shewed cause. The county court judge was right in giving judgment for the plaintiff, for he expressly finds that the

plaintiff's name was fraudulently omitted from the debtor's statement under the liquidation. The effect of such a fraudulent omission is discussed in *Elmslie* v. *Corrie*. (1) There the plaintiff's name had not been included in the list of creditors under a liquidation by arrangement, and it was held, following *Heather* v. *Webb* (2), that the discharge was good, as the omission was not fraudulent, Brett, L.J., saying, "If the name of a creditor is fraudulently omitted, the proceedings might have been set aside, and the creditor might sue for his debt. By s. 127, the case of fraud is expressly dealt with; that of an innocent omission is not mentioned." And Cotton, L.J., adds, "The omission is not fraudulent."

Secondly, there is evidence of a promise after the liquidation to pay the plaintiff's debt, in consideration of his not disclosing the fact of the debt to the debtor's father-in-law: *Jakeman* v. *Cook*. (3)

Crump, in support of the rule. Conceding that the omission of the plaintiff's debt from the testator's statement of affairs was fraudulent, it did not affect the order of discharge or entitle the plaintiff to sue for his debt.

[LUSH, J. What meaning do you give to the words of s. 127, by which the registration of the resolution is "in the absence of fraud," to be conclusive evidence that it was duly passed?]

This can only mean that it shall be competent in the Court of Bankruptcy to prove that this resolution was passed by means of fraud, but when the certificate is put in evidence before another Court it must be taken to be conclusive.

LUSH, J. I am of opinion that our judgment ought to be in favour of the defendant. The question involves the construction of the Bankruptcy Act, 1869, s. 49. Under s. 125 the creditors of an insolvent debtor may pass a resolution for the liquidation of his affairs by arrangement. By sub-s. 3 the debtor is to produce to the meeting a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due. By sub-s. 9 the provisions of the Act with respect to the close of the bankruptcy and the discharge of a bankrupt

(1) 4 Q. B. D. 295. (2) 2 C. P. D. 1.
(3) 4 Ex. D. 26.

1880

WADSWORTH v. PICKLES.

are not to apply in the case of a debtor whose affairs are under liquidation by arrangement, but the discharge of the debtor may be granted by a special resolution of the creditors in general meeting, and by sub-s. 10 the trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under the Act. In the present case the trustees did report the discharge of the debtor to the registrar, and a certificate was given by the registrar, and we have therefore to see what is the effect of an order of discharge under the Act. By s. 49 an order of discharge is not to release the bankrupt from any debt or liability incurred by means of any fraud, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts proveable under the bankruptcy (with certain exceptions which are not material). Now in the present case it is not contended that the debt due to the plaintiff was contracted by means of fraud, and the only clause which affords any ground for the plaintiff's argument is s. 127, which enacts that the registration by the registrar of a special resolution of creditors on the occasion of a liquidation by arrangement, shall, in the absence of fraud, be conclusive evidence that the resolution was duly passed and the requisitions of the Act in respect of such resolution duly complied with. The section does not in terms say what shall be the effect of fraud, but it seems to me that it can only mean that where there is evidence of fraud on the part of the debtor in procuring the passing of the resolution, such as bribery of particular creditors or the like, any debtor is to be at liberty to oppose the registration or to apply to the Court of Bankruptcy to set it aside in case it has actually been accomplished. But although the existence of fraud may be very good ground for an application to the Court to place the parties in statu quo, yet so long as the registration stands it will be an answer to an action by any creditor under the liquidation. And there being no proof of any new or fresh consideration to support the testator's promise after the date of the liquidation to pay the amount of the debt, the liquidation proceedings are a bar to the action, and the rule must be made absolute.

1880

WADSWORTH v. PICKLES.

FIELD, J. I am of the same opinion. The defendant in the county court relied upon a resolution of creditors for the testator's discharge under the Bankruptcy Act, 1869. Evidence was given that this resolution was passed according to the regulations of the Act, and there was no allegation or proof that the debt or liability in respect of which the plaintiff sued was incurred by fraud.

The learned judge seems to have thought that there was evidence of fraud in omitting the plaintiff's name from the testator's list of creditors, and that therefore the resolution was not binding on the plaintiff. But I think that the words in s. 127 relating to fraud have no application in the present case. These words relate to a stage in the liquidation at which a resolution has been passed, and mean that evidence may be given for the purpose of shewing that the resolution ought not to be registered. It is not meant that evidence of fraud is to effect the validity of an existing order of discharge in collateral proceedings. *Elmslie* v. *Corrie* (1), is quite consistent with this view. Upon the other point, as to whether there was sufficient consideration for a fresh promise after the liquidation, I entirely agree with my Brother Lush.

Rule absolute.

Solicitors for plaintiff: *Flower & Nussey.*

Solicitors for defendant: *Emmet & Son, for C. B. Cottam.*

(1) 4 Q. B. D. 295.

1880
Aug. 7.

THE NEW ZEALAND AND AUSTRALIAN LAND COMPANY *v.* RUSTON, AND ANOTHER.

Principal and Agent—Undisclosed Principal—Consignor and Consignee—Sub-contract—Right to ~~borrow~~ Money—Trustee.

The plaintiffs were landowners in New Zealand having offices in Glasgow, but no office or agency in London. They were in the habit of shipping corn from New Zealand, taking bills of lading which made it deliverable to them in London, and indorsing these bills of lading to M. & T., merchants and factors of Glasgow, with instructions to sell the goods in London. M. & T., when any sales had been effected, delivered account sales in the usual form, deducting a del credere commission of 3 per cent. M. & T. having no house or agency in London were themselves in the habit of indorsing to the defendants, who were corn factors and brokers in London, the bills of lading so received by them from the plaintiffs for the purpose of delivering the same in London, the terms upon which the defendants were employed varying from those under which M. & T. acted as regards rate of commission and time of payment. The indorsement of the bills of lading by the plaintiffs to M. & T., and by M. & T. to the defendants, was in each case only for the purpose of selling the corn, and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. & T. in London were made by brokers employed by M. & T., but the plaintiffs were in no way parties to the particular contracts of sale, nor were their names disclosed upon them. The defendants effected sales of certain parcels of the corn in question, and paid the proceeds into their own account with their bankers, and from time to time made several remittances to M. & T. on account of them; but upon reference to the defendants' books of account, the proceeds of the sale of the particular parcels of corn could be separated and identified.

The plaintiffs having brought an action against the defendants for the net balance due from them in respect of the corn, after deducting the remittances made to M. & T.; the jury found at the trial, first, that the plaintiffs did not through their agents employ the defendants to sell and account for the proceeds of the corn, secondly, that the defendants knew or had reason to believe that M. & T. were acting in the sales as agents for a third person:—

Held, by Field, J., that, notwithstanding the first finding, the plaintiffs were upon the admitted facts entitled to recover the balance claimed from the defendants, without any set-off in respect of other transactions between the defendants and M. & T., and that their right to recover was both as undisclosed principals, and also as being owners of the corn, and as such entitled to follow the proceeds of their property in the hands of the defendants in their fiduciary character of agents and trustees.

ACTION to recover 2571*l.* 8*s.* 6*d.* as the balance due in respect of corn consigned for sale to the defendants. At the trial before Field J., and a special jury, the case was reserved for further consideration upon the findings of the jury.

June 26. *H. Matthews, Q.C., W. Williams, Q.C,* and *J. C. Mathew,* for the plaintiffs.

C. Russell, Q.C., and *Finlay*, for the defendants.

Cur. adv. vult.

The facts and arguments sufficiently appear in the judgment.

Aug. 7. FIELD, J. The plaintiffs in this action sought to recover the sum of 2571*l.* 8*s.* 6*d.*, being the balance in the defendants' hands of the proceeds of three cargoes of wheat (sold by them on the London corn-market) after giving them credit for such sums of money as they had remitted on account of the cargo to Messrs. Matthews & Thielman (by whose order they had effected the sales).

The defendants admitted the fact of the sales, the receipt of the proceeds, and the amount of the balance; but defended themselves by alleging that they had acted under the employment of and received the proceeds for the account of Messrs. Matthews & Thielman, and not of the plaintiffs, and that there was no such privity of contract between the plaintiffs and them as rendered them liable to the plaintiffs; and, further, that, even if there were any such relation of principal and agent between them, they were entitled to set off against this balance money due to them from Messrs. Matthews & Thielman upon other accounts; the sales having (as they alleged) been effected upon the employment of the latter under a distinct and separate contract, in which the name of the plaintiffs was not disclosed. Upon the balance of these accounts the defendants admitted that there was due from them to Messrs. Matthews & Thielman a sum of 121*l.* 10*s.* 1*d.*, as to which an arrangement had been made which it is not necessary to enter into here.

The action arose under these circumstances:—The plaintiffs are the owners of large estates in New Zealand, and have for many years shipped the produce of their estates to England for realization, and principally on the London market. They have their offices in Glasgow, but have neither office nor agency in London; and the mode adopted by them for realization of their produce has been for the agents in the colony to ship the wheat there and

1880

NEW ZEALAND LAND CO. v. RUSTON.

take bills of lading making it deliverable in London to the plaintiffs. These bills of lading were forwarded from the colony to the office at Glasgow; and the course of business there has been for the plaintiffs' secretary to indorse the bills specially to the above-mentioned firm of Matthews & Thielman, with instructions as the agents of the plaintiffs to sell the goods in London. It was not intended by the parties to pass nor did the plaintiffs pass the property in the goods to Messrs. Matthews and Thielman, who had nothing more vested in them but an authority to sell, with the necessary right of possession.

Messrs. Matthews & Thielman were until the month of October, 1878 (when their estate came under process of sequestration in Scotland), merchants and factors of great respectability and in a large way of business in Glasgow; and the plaintiffs (who only knew them as factors, and not as merchants) always reposed the greatest confidence in them, and never made any inquiry as to, or in any way trusted or gave credit to, any of Matthews & Thielman's subordinate agents, who might be employed by them for the purpose of the requisite sales of the plaintiffs' produce.

The course of business between the plaintiffs and Messrs. Matthews & Thielman was, for the latter, when any given sales had been effected, to deliver "account sales" in the usual form debiting all expenses, and del credere commission of 3 per cent., and then pay the balance appearing upon the account, by cheque, at the expiration of three months from the average date of the sales appearing upon the account.

Messrs. Matthews & Thielman had no house or agency in London; and their mode of realizing the produce on behalf of the plaintiffs was, to indorse the bills of lading received by them from the plaintiffs specially to the defendants, who are extensive corn-factors and brokers in London, for the purpose of sale by them; and the terms of their employment differed from those upon which the plaintiffs employed Messrs. Matthews & Thielman, the defendants' terms being a factorage of 2 per cent., and the balance being payable at one month and three days from average date of sales.

The plaintiffs were aware that sales effected by Matthews & Thielman for them in London were made by brokers or agents

employed by them; but the plaintiffs were in no way parties to these sub-contracts, and the plaintiffs' names were not disclosed upon them, Messrs. Matthews & Thielman appearing upon the face of them, not as agents for any one, but as principals.

It was not intended, on such sub-indorsement of the bills of lading by Matthews & Thielman to the defendants, that any property should nor did any property pass to the latter, the indorsement to them being, like the indorsement by the plaintiffs to Matthews & Thielman, only for the purpose of sale. The property, therefore, in the cargoes remained in the plaintiffs from the beginning until the defendants had effected a sale, and passed the property to their buyers in pursuance of the authority vested by the plaintiffs in Messrs. Matthews & Thielman and the subordinate mandate of the latter to the defendants.

The moneys sought to be recovered in this action represented the balance of the proceeds of three cargoes of wheat ex *James Wishart, Auckland* and *Oamaru,* the bills of lading of which were indorsed and delivered by the plaintiffs to Matthews & Thielman, and by Matthews & Thielman to the defendants in the manner and for the purpose before stated.

The defendants in pursuance of their employment effected sales of the cargoes in question, and paid the proceeds into their own account with their bankers in the ordinary way, thus mixing up these proceeds with all their receipts from other sources, and from time to time making general remittances to Messrs. Matthews & Thielman on account of them.

The defendants' books of course shew the amounts received and paid in respect of each particular cargo, so that there is not the slightest difficulty in separating the proceeds of these sales from the other credits of the defendants appearing in their accounts, and thus tracing and identifying them.

In arriving at the balance of 2571*l.* 8*s.* 6*d.* claimed by the plaintiffs in this action, they have given credit to the defendants for all sums thus remitted, and they are claiming in this action only the net balance in the hands of the defendants, upon the consignments and sales of these three cargoes, at the time when the plaintiffs intervened and claimed as principals to receive the then existing balance, free from the claim on the

1880

NEW ZEALAND LAND CO. v. RUSTON.

part of the defendants to set off against the balance amounts due to them from Messrs. Matthews & Thielman upon other transactions.

At the trial I left two questions to the jury,—first, Did the plaintiffs through their agents employ the defendants to sell and account for the proceeds to the plaintiffs, and did the defendants accept that employment and sell for the plaintiffs? Secondly, Did the defendants know or have reason to believe that Matthews & Thielman were acting in these sales as agents for another? The jury negatived the first and affirmed the second proposition; and I now proceed to deliver my judgment.

The first question raised is, whether there is any such privity of contract between the plaintiffs and the defendants as to entitle the former to sue the latter.

At the trial, there being no fact in dispute as to the nature and character of the various dealings and employments of which I have given a narrative, I was inclined, as I still am, to treat this as a question of law arising upon and to be implied from the admitted relation of the parties: but the learned counsel for the defendants strongly urged me to leave the first question to the jury; and, as I am always desirous of avoiding any miscarriage of justice on such a ground, and also of having in a mercantile case the assistance of a jury of merchants, I thought it advisable to do so.

I put the question in the words of the plaintiffs' statement of claim; and inasmuch as (as pointed out by Mr. Russell for the defendants) there was in this case, first a contract of employment by the plaintiffs of Messrs. Matthews & Thielman upon one set of terms, and secondly a sub-contract of employment, to which the plaintiffs were not expressly parties, by Matthews & Thielman and the defendants upon different terms, and that in the absence of the existence of any agency in Matthews & Thielman for a third person known to or believed to exist by the defendants, it is no doubt true, in a sense, that the plaintiffs did not directly in the words of the question employ the defendants to sell for them. But it has never appeared to me that the separate contracts of employment, or the difference in the mode and amount of remuneration, or in the times at which the balances were payable, which

existed between the two contracts in this case, can make any difference in the legal relation of the parties to each other. As regards the existence of the mandate of sale, which is common to both, there is not of course the slightest doubt but that a contract may be effected by one man with another through the intervention of a mesne agent, as was done here, although the terms of employment may differ in some respects.

The owner of an estate in England employs a manager at a salary to realize the produce of his estate, leaving him absolute discretion as to the way in which he thinks it most advisable to realize, and the latter employs a broker or factor or agent on commission to effect the sale; but it cannot for a moment be supposed that the original principal may not, at any time before the sub-agent has accounted to the mesne agent and paid over to him or accounted for the proceeds of the sale (subject of course to any set-off accrued in ignorance that the mesne agent was not a principal), intervene and claim the proceeds.

This principle was laid down by Lord Mansfield in *Rabone* v. *Williams* (1), in which he says where a factor dealing for a principal, but concealing him, delivers goods in his own name, the principal may appear and bring an action in his own name. It was stated again in *Sims* v. *Bond* (2), where it was said, that, where a contract not under seal is made with an agent for an undisclosed principal in the name of the agent, either the agent or the principal may sue upon it. And this doctrine seems to me applicable to contracts of employment as to those of sale, and to authorize the intervention by the principal in the contract with the sub-agent, as fully as it does in the ultimate contract of sale by the latter.

In my direction to the jury I pointed out the various elements of the case to which I have now adverted. And, in arriving at the conclusion on the first question at which they did arrive, I am bound to assume that they took all these matters into their consideration. Inasmuch, however, as there were, as I have already stated, clearly two different contracts of employment, one between the plaintiffs and Matthews & Thielman, and the other between Matthews & Thielman and the defendants, in which the

(1) 7 T. R. 360, n. (2) 5 B. & Ad. 389.

1880

NEW ZEALAND LAND CO. v. RUSTON.

plaintiffs' name was not disclosed and to which they were in fact no party, it may be that the jury failed to realize the existence of the employment to sell, which was the leading object of and ran through both contracts, and in respect of which element in the contract which is common to both, is based the right of the original principal to intervene and sue the ultimate agent or the ultimate vendee, as the case may be, subject to all their existing equities.

But, however this may be, I cannot allow the finding of the jury to stand in the way of what appears to me to be the true result of the admitted facts, and which constituted in my judgment that relation between the plaintiffs, Messrs. Matthews & Thielman, and the defendants, in the events which have happened, which entitles the plaintiffs to sue the defendants for the balance now in their hands.

The learned counsel for the defendants in support of their contention to the contrary relied upon the cases of *Williams* v. *Everett* (1); *Robbins* v. *Fennell* (2), and other cases of that description: but, upon examination, it appears that these cases proceeded either upon different principles, or were decided upon their own particular facts.

There is, of course, no doubt that the right of the principal, when he employs the factor and allows him to sell in his own name, to call upon the sub-agent or vendee, is subject to the right of the sub-agent or purchaser to claim the benefit of any payment or set-off which may have been made or accrued in ignorance of the fact that the mesne agent filled that capacity: but it is also equally clear that, if the sub-agent or vendees knew, or had the means of knowing, that he was dealing not with a principal but with an agent for somebody else, no such right exists: *Fish* v. *Kempton.* (3)

Now, the jury have found in the present case (to my entire satisfaction) that the defendants did at the time of their employment know that Matthews & Thielman were acting for somebody else; and the consequence therefore is, that, in my judgment, the defendants are not only directly liable to account to the plaintiffs,

(1) 14 East, 582. (2) 11 Q. B. 248.
(3) 7 C. B. at p. 694.

but are not entitled to set off any claim arising at other times and upon other transactions which they may have against Matthews & Thielman.

I should have been quite content to have rested my judgment for the plaintiffs upon the application of these principles. But Mr. Watkin Williams for the plaintiffs also relied upon the second finding of the jury, as conclusively entitling the plaintiffs to judgment in respect of their rights as owners of the cargoes, and as such entitled to follow the proceeds of the property in the hands of the defendants in their fiduciary character of agents and trustees.

I think this contention well founded. It cannot be denied that the plaintiffs handed the bills of lading in question to Matthews & Thielman as agents for the sale of the goods on the plaintiffs' account, and that Matthews & Thielman handed them to the defendants for the like purpose on their account. The jury have found, as I have also stated, that the defendants had reason to believe that Matthews & Thielman were thus acting as agents for some other person. The evidence leaves no doubt in my mind that the defendants also knew that the plaintiffs were that "other person:" but, whether that be so or not is in my judgment immaterial. It is now well and clearly established that a factor, broker, or other mere agent for sale, is in the same position with regard to his principal, as all other trustees or bailees who occupy a fiduciary position are with regard to their cestuis que trust: *Knatchbull* v. *Hallett*. (1) And therefore, whether the particular name of the principal were known or not, a fiduciary relation of principal and agent was constituted in this case between the defendants and the plaintiffs, who were actually the principals. The plaintiffs, therefore, had the right at any moment of time, before their property was altered by sale, to intervene and claim and take back the bills of lading from either Matthews & Thielman or the defendants, satisfying or subject to any equitable rights or liabilities which might have come into existence, in consequence of their trusting Matthews & Thielman with the documents of title and possession. They might even have intervened after a valid contract of sale with a vendee had

(1) 13 Ch. D. 696.

1880

NEW ZEALAND LAND CO. v. RUSTON.

been made, and claim from the latter any unpaid purchase-money, subject to similar equities.

In the present case that stage had been passed, and the purchase-moneys had been actually received by the defendants in their capacity of agents from the vendees. Is there any reason why the plaintiffs should not claim and recover these net proceeds from their trustees?

No doubt, it has been thought at common law, that, when the money of a principal has been received by an agent and mixed up and confused with his own property, so that the somewhat technical rules of the common law did not supply a known remedy, this could not be done. However this may have been, it is now established that, possessing, as I now do, all the powers of, and entitled to administer all the equities administered by, a Court of Equity, I am hampered by no such difficulty.

The doctrine of the Court of Equity, whose jurisdiction I now have, is, that, if property is disposed of by persons in a fiduciary position, the persons employing can, if the sale is rightful, take the proceeds of the sale, if he can identify them; and, if the sale is wrongful, he can still take the proceeds of the sale, because he may adopt the sale for that purpose. The right of the beneficial owner to follow the proceeds remains, although the proceeds may have been invested together with moneys belonging to his trustee or agent; and, if the trustee or agent sell the goods bailed, the bailee can follow the proceeds wherever they can be distinguished, whether they are kept actually separate or are mixed up with other moneys: *Knatchbull* v. *Hallett*. (1) It is in fact a mere question of identity.

Now, applying these principles to the facts of the present case, I find that the relation of trustee and cestui que trust (using the words in the enlarged sense to which I have adverted) existed between the plaintiffs and the defendants, either originally or at the time of the rightful intervention of the plaintiffs; at which time the latter had in their hands the sum now claimed, and capable of being traced and identified as the proceeds of the trust property.

I further find that the defendants had notice of the existence of

(1) 13 Ch. D. 696.

1880

NEW ZEALAND LAND CO. v. RUSTON.

the trust, so as to prevent them from being equitably entitled to set off any claim against Matthews & Thielman, other than such as arose out of the consignments in question; and I therefore give judgment for the plaintiffs for 2449*l.* 18*s*, with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Young, Jones, Roberts, & Hale.*
Solicitors for defendants: *Stibbard, Gibson, & Co.*

[IN THE COURT OF APPEAL.]

May 13.

THE QUEEN *v.* SIR CHARLES REED.

Elementary Education Act, 1873 (36 & 37 *Vict. c.* 86), *s.* 10—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 53, 54—*School Board—Borrowing Powers—Temporary Loan for current Expenses.*

A school board have not power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates.

Decision of the Queen's Bench Division (4 Q. B. D. 477) reversed.

APPEAL of H. L. Roberts from an order of the Queen's Bench Division quashing the disallowance and surcharge by the auditor of the Metropolitan District of a sum of 83*l.* 11*s.* 2*d.* in the accounts of the London School Board.

The facts are sufficiently stated in the report of the proceedings in the Queen's Bench Division (1), and in the judgment of this Court.

April 12. *Sir H. Giffard, S.G.*, and *Anstie*, for *H. L. Roberts.* Any person aggrieved by the allowance, disallowance, or surcharge by the district auditor has the right to appeal: 7 & 8 Vict. c. 101, s. 35; 33 & 34 Vict. c. 75, s. 60, sub-s. 6. The question is whether a school board has power to borrow money and to agree to pay interest upon the loan so as to make the ratepayers liable. By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 53 (2) a school fund is to be formed; by s. 54 any deficiency

(1) 4 Q. B. D. 477.

(2) By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 53: "the expenses of the school board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars,

1880

THE QUEEN v. SIR CHARLES REED.

in the school fund is to be met by rates; by s. 57, power to borrow for certain purposes with the consent of the Education Department was conferred. This last-named section has been however repealed by the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), s. 28, sch. 4, but its provisions are substantially re-enacted by s. 10 of the later Act. The charge for interest imposes a burden upon the ratepayers, and it is not to be assumed that the legislature intended to tax the Queen's subjects unless that intention is expressed in clear terms. It may be contended upon behalf of the school board that corporations in general have a power to borrow: this proposition, however is not correct; it has been held that a corporation has power to borrow where it is necessary to do so in order to carry out the object for which it was constituted, and therefore trading corporations have power to borrow; but a school board is a corporation intrusted with certain special powers, which must not be exceeded: *Burmester* v. *Norris* (1); *Chambers* v. *Manchester and Milford Ry. Co.* (2); *Bateman* v. *Mid-Wales Ry. Co.* (3)

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or out of moneys provided by Parliament, or raised by way of loan, or in any manner whatever received by the school board as provided by this Act.

Sect. 54: "Any sum required to meet any deficiency in the school fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate. The school board may serve their precept on the rating authority, requiring such authority to pay the amount specified therein to the treasurer of the school board out of the local rate, and such rating authority shall pay the same accordingly, and the receipt of such treasurer shall be a good discharge for the amount so paid, and the same shall be carried to the school fund. If the rating authority have no moneys in their hands in respect of the local rate, they shall, or if they have paid the amount then for the purpose of reimbursing themselves they may, notwithstanding any limit under any Act of Parliament or otherwise, levy the said rate, or any contributions thereto, or any increase of the said rate or contributions, and for that purpose shall have the same powers of levying a rate and requiring contributions as they have for the purpose of defraying expenses to which the local rate is ordinarily applicable."

By the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), s. 10, a school board may, with the consent of the Education Department, borrow money on the security of the school fund and local rate for the purposes of providing, enlarging, improving, or fitting up school-houses, or of paying any debt charged on a school-house or on any land acquired by them.

(1) 6 Ex. 796; 21 L. J. (N.S.) (Ex.) 43.

(2) 5 B. & S. 588; 33 L. J. (Q.B.) 268. 10 Jur. (N.S.) 760

(3) Law Rep. 1 C. P. 499.

1880

THE QUEEN v. SIR CHARLES REED.

[BRETT, L.J. The authority of those cases was not impugned by the judgment in the Queen's Bench Division, but the judges held that a school board is invested with power to borrow by the statutes, under which it is incorporated.]

Ever since *Tawney's Case* (1) it has been considered that in matters relating to poor law a rate cannot be made to repay money borrowed, and this case was in effect acted upon in *Waddington* v. *Guardians of the Poor of the City of London Union* (2), decided in the Court of Exchequer Chamber. In like manner an overseer has no power to borrow money to be applied by him to parochial purposes: *Leigh* v. *Taylor*. (3) It may be urged that the loan in the present case was only temporary, but the principle is just the same, whether the money is borrowed for a week or for several years; and if the School Board of London is entitled to obtain funds by way of loan, every school board in England can claim the same privilege. The legislature has given precise directions how the finances of school boards are to be managed, and has conferred a limited power of borrowing upon school boards; that limited power must be strictly followed and excludes the extended power of borrowing suggested by the counsel for Sir C. Reed; the maxim applies, expressio unius est exclusio alterius. It may be that a school board has power to contract debts for the purposes for which it has been incorporated; but there is a distinction between borrowing money and obtaining goods on credit: *Ex parte Chippendale, Re German Mining Co.* (4)

Jeune (*Sir H. James, Q.C.*, with him), for Sir Charles Reed. The statutes relating to the relief of the poor throw no light upon the construction of the Elementary Education Act, 1870. They are framed in a different manner. The principle that a rate to discharge a past liability is bad does not apply to school boards. 43 Eliz. c. 2, relates to money to be raised by the overseers, and to be expended by them upon persons who are without the means of livelihood. It may be that no statutory provision expressly authorises the loan made in the present case; but by the ordinary principles of law a corporation can borrow money: *In re Patent*

(1) 2 Salk. 531.
(2) E. B. & E. 370; 28 L. J. (M.C.) 113.
(3) 7 B. & C. 491.
(4) 4 D. M. & G. 19.

1880

THE QUEEN v. SIR CHARLES REED.

File Co., Ex parte Birmingham Banking Co. (1) The question is not whether the legislature has conferred upon school boards the power to borrow money, but whether it has taken it away.

[COTTON, L.J. *In re Patent File Co.* (1) was the case of a trading corporation, which may have the power to borrow or to mortgage its property for the purpose of enabling it to carry on its trade.]

But further the transaction may be considered as a mere overdraft, and there is a great distinction between an ordinary loan and borrowing money temporarily from bankers: *In re Cefn Cilcen Mining Co.* (2); *Waterlow* v. *Sharp* and *Gardiner* v. *Sharp.* (3) The argument upon the other side must go to this extent, that a school board must provide for every item of its expenditure out of the rates. The Elementary Education Acts contain no provision for meeting temporary difficulties, but they contemplate that debts may be incurred in order to meet those difficulties. It is more convenient to borrow money, and if the legislature had intended that loans should not be contracted, they would have so enacted in express terms. To borrow unnecessarily would no doubt be an abuse of the authority conferred upon school boards; but it was no doubt thought that a public body would discharge its duties in a proper manner.

Sir H. Giffard, S.G., in reply. The principle, that a rate to discharge past liabilities is bad, belongs to the common law; it applies not merely to poor rates, but also to church rates: *Rex* v. *Chapelwardens of Bradford* (4): and to county rates: *Rex* v. *Justices of Flintshire.* (5) It would follow from the argument upon the other side that to borrow money would be not merely an exceptional, but an ordinary mode of providing funds to meet the requirements of the school board.

Cur. adv. vult.

May 13. The judgment of the Court (Brett, Cotton, and Thesiger, L.JJ.) was now delivered by

COTTON, L.J. This is an appeal from the Queen's Bench

(1) Law Rep. 6 Ch. 83.
(2) Law Rep. 7 Eq. 88.
(3) Law Rep. 8 Eq. 501.
(4) 12 East, 556.
(5) 5 B. & A. 761.

Division, and the question is whether or no a school board has under the Act 33 & 34 Vict. c. 75, and the amending Act of 36 & 37 Vict. c. 86, power to borrow money for purposes and in a manner not within the 10th section of the later Act, and to charge the ratepayers with interest, which the school board have paid under the contract of loan. The Queen's Bench Division decided that they have such power, and from that decision there has been an appeal to this Court. The respondent in the particular case is the chairman of the London School Board, but the Acts referred to and the question which is raised apply equally to all school boards. The question arises in this way. In the accounts of the London School Board for the half year ending Lady Day, 1879, there was a charge of 83*l.* 11*s.* 2*d.* for interest paid to the Bank of England, the treasurers of the school board, upon sums advanced as temporary loans, and amounting in the whole to 40,000*l.* This the auditor for the Metropolitan District disallowed as an illegal charge or payment, and he surcharged the sum on Sir Charles Reed, the chairman of the board. The Queen's Bench Division on an application made to them quashed this disallowance and surcharge.

School boards are constituted under the Act 33 & 34 Vict. c. 75. Sects. 53 to 58 of that Act direct how the expenses of the school board are to be provided for, and of these sections s. 57 gives an express power to borrow for certain purposes and in a certain manner. This section was repealed by s. 10 of the later Act, which gives a similar but slightly varied power of borrowing for particular purposes, and in a particular manner only. It was not contended that the loan had been contracted under the powers of this section.

It was argued before us that the so called loans might be treated as payment by the bankers of cheques drawn by the board for purposes authorized by the Act, when there was no balance in the hands of the bankers or treasurer to meet the cheques, and that this was not borrowing. It is unnecessary in our opinion to decide whether this would be borrowing, inasmuch as in our opinion we must treat the transaction as one not of mere overdraft but as an advance made on terms agreed upon between the banker and customer, and the counsel for the school board in

1880

THE QUEEN v. SIR CHARLES REED.

effect contended that the school board had, independently of s. 10, power to borrow such sums of money as they might think fit to raise for purposes authorized by the Act, though he conceded that to do so to an excessive amount would be an abuse of their power. Has the school board any such power? It was conceded that there was no express power in the Act to raise the money borrowed in the present case. But it was said that every corporation, unless restricted by its act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion this contention on behalf of the school board cannot be maintained. In our opinion the power of a corporation established for certain specified purposes must depend on what those purposes are, and except so far as it has express powers given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted. But the counsel for the respondent also contended that school boards had an implied power to borrow, and that the existence of such a power was to be implied either from the terms of the Acts or on the ground that such a power is necessary to enable school boards to discharge the duties imposed upon them by the Acts. As we understand the reasons given by the judges in the Queen's Bench Division for their decision, neither of them adopted the proposition contended for by the respondent as to the power of corporations to borrow, but decided in favour of the school board either on the ground that the terms of the 53rd section of the Act 33 & 34 Vict. c. 75, impliedly gave the school board power to borrow money, or that such a power was necessary to enable them duly to discharge their duties. The words of the 53rd section are as follows:—[His Lordship read them]. The words relied upon by the Lord Chief Justice were "out of moneys raised by way of loan." In the first place this section does not give the board any power of raising money. It only provides how expenses are to be paid out of funds, which it assumes that the board have power to raise. If there had been no express power of borrowing contained in the Act, it might have been said that the words relied upon by the Lord Chief Justice assumed that the board had an implied power of borrowing; but the express power given by s. 57 of that

Act (now existing under the 10th section of the later Act) is sufficient to satisfy the words relied upon by the Lord Chief Justice, and, in our opinion, prevent any implication of a general power to borrow being raised by those words. Is there anything else in the Acts which gives a school board by implication a power to borrow money? The express power to borrow given in certain specified cases is against raising an implication of any power to borrow. But we must look at the words of the Acts. The express power to borrow given originally by the 57th section of the Act of 1870, and now by the 10th section of the later Act, is in both given only in the event of the Education Department consenting to the payment of expenses therein mentioned being spread over several years, which, in our opinion, shews an intention that, except in the cases specified in those sections and with the consent therein referred to, all expenses were to be paid as they from time to time were incurred; and s. 54 of the Act of 1870 enacts that the means of making these payments, except so far as provided by the other sources mentioned in s. 53, is to be provided by funds to be from time to time paid by the rating authority of each district to the school board in accordance with a precept served by the school board. This is against implying from the words of the Act any power to borrow, and, in our opinion, there are no words in the Acts from which power to borrow money can be given by implication to the school board. It remains to be considered whether it is reasonably necessary that a school board in order to discharge its duties should have power to borrow. But s. 54 enacts that "any sum required to meet any deficiency in the school fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate." No doubt the school board has from time to time to make payments to a large amount. But the sum required to meet these payments can be calculated, and the 54th section enables the board to raise by precept on the rating authority the sum necessary to provide for future expenses, and if they allow a reasonable margin to meet unexpected payments, we can see no reason why, by the means pointed out in s. 54, they should not, without any borrowing, provide for their current expenses. A trading corporation stands, as regards an implied power of borrowing, in a very different position from a school

1880

THE QUEEN v. SIR CHARLES REED.

board. In our opinion it is not necessary to enable a school board to discharge its duties in a reasonable way, or to make the payments which it has to make, that the board should borrow money. In our opinion, with the exception of the powers given by s. 10 of the Act of 1873, a school board has no power to borrow. We think that the auditor rightly disallowed the charge of interest. But it must be remembered that under s. 4 of the 11 & 12 Vict. c. 91 power is given to the Poor Law Commissioners, now vested in the Local Government Board, to allow any sum properly disallowed or surcharged by the auditors, if in their opinion it is fair and equitable that such disallowance or surcharge should be remitted. This will obviate any injustice or difficulty in event of the school board in consequence of some unforeseen emergency finding it necessary to borrow. In our opinion the appeal must be allowed, and the judgment appealed from reversed.

Judgment reversed.

Solicitors for H. L. Roberts: *Sharpe, Parkers, Pritchard, & Sharpe.*

Solicitors for school board: *Gedge, Kirby, & Millett.*

June 25.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THOMAS CASTRO, OTHERWISE ARTHUR ORTON, OTHERWISE SIR ROGER CHARLES DOUGHTY TICHBORNE, BARONET.

Criminal Law — Practice — Misdemeanour — Perjury — Joinder of Distinct Offences in one Indictment—Deferred Sentence—2 Geo. 2, c. 25, s. 2.

Upon an indictment for misdemeanour containing two counts for distinct offences the defendant may be sentenced to imprisonment or penal servitude for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence.

Under 2 Geo. 2, c. 25, s. 2, a defendant convicted of perjury upon an indictment containing two counts for distinct offences may be sentenced to consecutive terms of penal servitude.

Upon an indictment for perjury charging offences committed in different suits the defendant upon conviction may be sentenced to distinct punishments, although the suits were instituted with a common object.

C. was convicted upon an indictment for perjury containing two counts: in

one count the offence was alleged to have been committed in an action in the Court of Common Pleas, in the other it was alleged to have been committed in a suit in the Court of Chancery, but the proceedings in both courts had one object. C. was sentenced to two consecutive terms of seven years' penal servitude :—

Held, that the sentences might be lawfully passed.

Writ of error upon a judgment of the Court of Queen's Bench upon an indictment for perjury. (1)

The record set out that on the 8th of April in the thirty-fifth year of the reign of the Queen, at the Central Criminal Court it was presented that on the 10th of May, 1871, at Westminster, before Bovill, C.J., an issue joined in an action of ejectment between the plaintiff in error, as claimant, and F. Lushington and Lady T. M. J. Doughty Tichborne and Hon. W. Stourton, guardians of Sir H. A. J. Doughty Tichbourne, Bart., an infant, as defendants, came on to be tried and was on the day above-mentioned and on divers other days by adjournment tried by a jury; upon which trial the plaintiff in error appeared and was sworn as a witness upon his own behalf. The assignments of the perjury committed by the plaintiff in error were that he falsely swore that he was Roger Charles Tichborne, eldest son of Sir J. F. Doughty Tichborne, Bart., that he had resided at Paris from his birth until 1845, that a person named Adrien Chatillon had been his tutor, that in 1845 he came over from France to England to attend the funeral of Sir H. Tichborne, Bart., that he had been a student at the Jesuits' College at Stonyhurst, Lancashire, that he had been an officer in her Majesty's army, that he had in July or August, 1852, seen Lady Doughty, the wife of Sir E. Doughty, Bart., and her daughter, K. M. E. Doughty, afterwards the wife of J. P. P. Radcliffe, in the drawing-room of Tichborne House, Hampshire, that he had in July or August, 1852, seduced K. M. E. Doughty, that he had after the 22nd of June, 1852, and before March, 1853, seen K. M. E. Doughty, that he had seen Mary Hales in the presence of her mother or aunt at Canterbury, that he had been at the house of Captain and Mrs. Washington Hibbert, called Bilton Grange, that he had never been to Lloyd's Rooms, Royal Exchange, London, that he was not Arthur Orton, the son of George Orton of Wapping, that he had never been at

(1) Law Rep. 9 Q. B. 350.

1880

THE QUEEN v. CASTRO.

Wapping before 1866, that he had never gone by the name of Arthur Orton, that he did not leave England in a vessel called the *Ocean* in April, 1848, and did not arrive at Valparaiso in November, 1848, that he had not been at any time between 1848 and 1851 at Melipilla in Chili, that he did not in 1851 come back from Chili to England in a vessel called the *Jessie Miller*, that he had not seen Mary Anne Loader before 1867, and did not keep company with her in 1851, that he had never written letters to her, that he did not go out to Hobart Town in a vessel called the *Middleton*, of which a person named Story was master, that he had not seen Elizabeth Jury, Mary Anne Tredgett, and Margaret Ann Jury, or any of them, on more than one occasion before the trial before Bovill, C.J., that he had in 1859 at Castlemain, Victoria, been charged jointly with Arthur Orton with horse-stealing. The first count concluded as follows: "And so the jurors first aforesaid, upon their oath aforesaid, do say that the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Bart., of his own wicked and corrupt mind, to wit, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of Our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of Our Lady the Queen her Crown and dignity."

In a second count it was further presented that on the 7th of April, 1868, a suit had been commenced, and was depending in the Court of Chancery, wherein the plaintiff in error was the plaintiff, and wherein Hon. T. M. J. Doughty Tichborne, widow, Hon. W. Stourton, R. Arundel, E. Hopkins, R. J. Doughty Tichborne, an infant, and H. A. J. Doughty Tichborne, an infant, were defendants, in which suit the plaintiff in error by his amended bill of complaint prayed that in case it should be deemed requisite for him to take any proceedings at law by ejectment or otherwise, to recover possession of certain estates called the Tichborne estates, the defendants might be respectively restrained by injunction from setting up by way of defence certain outstanding terms, charges, orders, proceedings, and legal estates; that the plaintiff in error, according to the practice of the Court

of Chancery, on the 8th of April, 1868, gave notice of motion for a decree, which motion was afterwards made and heard by the Court; that on the 7th of April, 1868, the plaintiff in error appeared before W. Newman, a commissioner duly appointed to administer oaths in Chancery in the city of London, and tendered an affidavit in writing, and intended to be filed in the Court of Chancery, and to be read as evidence in support of the motion for decree, which affidavit was afterwards filed and read as intended; that the plaintiff in error swore before W. Newman that the matters in the affidavit contained were true. The assignments of the perjury committed by the plaintiff in error in the affidavit were that he falsely swore that he was the eldest son of Sir J. F. Doughty Tichborne, Bart., that he had resided at Paris from his birth until 1845, that he was brought over from Paris to England and afterwards placed at the Jesuits' College at Stonyhurst, Lancashire, that in July, 1849, he had been cornet, and subsequently lieutenant in her Majesty's 6th Dragoon Guards (Carabineers), that he had joined the regiment in October, 1849, at Dublin, and remained on duty with the regiment from October, 1849, until January, 1853 (except during temporary leave of absence), that he had retired from the regiment in February, 1853, that in March, 1853, he had taken passage on board a ship bound for Valparaiso, and arrived there in due course, and from that time until April, 1854, had travelled from place to place in various parts of South America, that in April, 1854, he had at Rio Janeiro taken his passage in the ship *Bella* of Liverpool for New York. The second count concluded in the same manner as the first.

The record then alleged the removal of the indictment into the Court of Queen's Bench, the plea of Not Guilty, and joinder thereon, the order for trial at bar, the order that the trial should commence on the 23rd of April, 1873, the order for enlarging the time for trying the issues, the order for summoning the jury, the commencement of the trial upon the 23rd of April, 1873, the adjournments of the trial until the 28th of February, 1874. The record then concluded as follows: "And now at this day, that is to say, on the said Saturday, the 28th day of February, in the year of Our Lord 1874, the jurors aforesaid, so empanelled and sworn

1880

THE QUEEN v. CASTRO.

as aforesaid to try the issues so joined as aforesaid, upon their oath say that the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him. Whereupon all and singular the premises being seen, and by the Court here fully understood, it is considered and adjudged and ordered by the Court here that he the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, for the offence charged in and by the first count of the said indictment be kept in penal servitude for the term of seven years now next ensuing; and that for and in respect of the offence charged in and by the second count of the said indictment he, the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, be kept in penal servitude for the further term of seven years, to commence immediately upon the expiration of his said term of penal servitude for his offence in the first count of the said indictment. And he, the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, is now committed to the custody of the keeper of the prison called her Majesty's gaol of Newgate, to be by him kept in safe custody in execution of this judgment."

The writ of error was dated the 16th of December, in 43 Vict., and error was duly assigned.

June 24, 25. *Benjamin, Q.C.*, and *L. A. Atherley-Jones* (*Hedderwick* and *Spratt*, with them), for the plaintiff in error. The indictment contains two counts, the one alleging perjury to have been committed at the trial of an action of ejectment in the Court of Common Pleas, the other alleging it to have been previously committed in an affidavit sworn before the Court of Chancery; but the assignments in the two counts are substantially the same, and the offence is really single. Before the Supreme Court of Judicature Acts, 1873, 1875, the tribunals for administering justice were divided, and the Court of Chancery was distinct

from the Court of Common Pleas: nevertheless the application to the Court of Chancery, in support of which the false affidavit was sworn, was for an injunction to restrain the setting up certain defences in the action of ejectment. The steps taken in the two Courts formed one proceeding for gaining possession of the lands claimed by the present plaintiff in error. The two Courts were ancillary to each other, and if the proceedings to recover the lands had been commenced since the passing of the Supreme Court of Judicature Acts, 1873, 1875, one division of the High Court of Justice would have had jurisdiction to grant all the relief alleged to be necessary for the prosecution of the claim of the present plaintiff in error. In fact, when the false affidavit was sworn, there was no issue before the Court of Chancery, it was merely a preliminary application; and therefore as perjury consists in wilfully and falsely swearing a matter material to the issue, the false affidavit cannot be the subject of an indictment for perjury. If the plaintiff in error had allowed his bill to be dismissed and had taken no further steps, he would not have been criminally liable for the false statement.

[JAMES, L.J. Cannot perjury be committed by falsely stating collateral matters?]

It must be admitted that some authority exists for holding, that perjury may be committed as to a matter not affecting the principal judgment to be given in the case: 1 Hawkins' Pleas of the Crown, bk. i. pt. 2, ch. 27, p. 430 (8th ed.) Nevertheless, as the application to the Court of Chancery and the action of ejectment formed but one proceeding, two sentences of penal servitude could not be passed. Perjury is in its nature a single offence: a conviction does not shew that all the assignments have been proved; if any assignment is established, it will sustain a verdict of guilty; and the reason is that all the false statements constitute but one crime: *O'Connell* v. *Reg.* (1); in this case the whole perjury committed by the plaintiff in error consisted in representing himself to be Roger Tichborne. Perjury is a misdemeanour, and each of these terms is a nomen collectivum: *Rex* v. *Powell* (2); *Ryalls* v. *Reg.* (3) Felony is distinguished from misdemeanour

(1) 11 C. & F. 155, at p. 417, per Lord Campbell. (2) 2 B. & Ad. 75.
(3) 11 Q. B. 781.

1880

THE QUEEN v. CASTRO.

in this respect: *Campbell* v. *Reg.* (1) In like manner it was held in *Crepps* v. *Durden* (2), that a person can commit but one offence on the same day by exercising his ordinary calling on a Sunday, contrary to the statute 29 Car. 2, c. 7. By being sentenced to undergo two terms of penal servitude the plaintiff in error has been sentenced to two punishments for one offence. The verdict of "guilty of the premises charged in and by both counts," only means that the plaintiff in error has been guilty of one act of perjury. It may be that cases such as *Gregory* v. *Reg.* (3), can be found, in which a person convicted upon an indictment or information for misdemeanour, has been sentenced to different terms of imprisonment upon successive counts; but no case can be found in which the aggregate sentences pronounced upon different counts of the indictment or information exceed the whole punishment allowed by law for a single offence.

[*Sir H. James, A.G.*, for the Crown. In *Rex* v. *Robinson* (4), it was held that separate sentences could be passed for terms exceeding the aggregate amount of punishment allowed by statute for one offence.]

In *Rex* v. *Robinson* (4) the real decision was that a sentence of two years' imprisonment was wrong: it was a mere dictum that two consecutive sentences each of one year's imprisonment would be lawful. A person cannot be punished separately for two false statements wilfully made in the course of proceedings taken by the same party with one object. Different misdemeanours may be joined in the same indictment, but that is because they may be treated as one offence: *Rex* v. *Benfield.* (5)

[BRETT, L.J. That case is wholly beside the matter before us.]

The principle, upon which different offences may be joined, can be deduced from *Rex* v. *Johnson.* (6) In felonies it is usual for the presiding judge to put the prosecutor to his election: *Rex* v. *Jones* (7); *Reg.* v. *Lonsdale.* (8)

[BRETT, L.J. *Rex* v. *Jones* (7) is against the argument for the plaintiff in error.]

(1) 1 Cox, 269.
(2) Cowp. 640; 1 Sm. L. C. 711, 8th ed.
(3) 15 Q. B. 974.
(4) 1 Mood. C. C. 413.
(5) 2 Burr. 980.
(6) 3 M. & S. 539, at p. 549.
(7) 2 Camp. 131.
(8) 4 F. & F. 56.

When a defendant is found guilty of misdemeanour, he is found guilty of all the misbehaviour charged in the indictment, which must be deemed to be one offence.

It is necessary to consider what punishment can be lawfully inflicted for the crime of perjury: by the common law the punishment at last came to be "fine and ransom, and never to bear testimony:" 3 Inst. c. 74, p. 163. By 5 Eliz. c. 9 subornation of perjury was made punishable by the forfeiture of 40*l.*, or in default of payment, by imprisonment and standing in the pillory, and by incapacity to be a witness; and perjury itself was punished by six months' imprisonment, and by forfeiture of 20*l.*, or in default of payment, by standing in the pillory, and by incapacity to be a witness. By 2 Geo. 2, c. 25, s. 2 (1), which is the statute relied upon as authorizing the judgment in the present case, a person convicted of perjury may be sentenced to seven years' transportation, for which penal servitude is now substituted (20 & 21 Vict. c. 3, s. 2); but this statute does not warrant cumulative sentences. The additional punishment of hard labour may be inflicted for perjury under 3 Geo. 4, c. 114, but that statute is not in point for the present case. Upon these statutes it is to be observed that the sentences as passed upon the two counts are bad, because they simply direct the plaintiff in error to be kept in penal servitude: he ought to have been at least sentenced to a nominal fine and imprisonment in order to satisfy the requirements of 2 Geo. 2, c. 25, s. 2: *Rex* v. *Price* (2); this oversight cannot be amended now, notwithstanding 11 & 12 Vict. c. 78, s. 5.

(1) By 2 Geo. 2, c. 25, s. 2: "And the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, be it further enacted that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas for a term not exceeding seven years, as the Court shall think most proper; and thereupon judgment shall be given that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being."

By 20 & 21 Vict. c. 3, s. 2, penal servitude is substituted for transportation.

(2) 6 East, 323.

1880

THE QUEEN v. CASTRO.

[JAMES, L.J. The material statute in that case was 18 Geo. 2, c. 18, relating to parliamentary elections; it was the particular wording of that statute, which induced the Court of King's Bench to alter its sentence.]

This is an indictment for an offence at common law; the counts do not conclude contra formam statuti, and therefore no punishment created by a statute can be inflicted: 2 Hale, P. C. 191, 192; Bacon's Abridgment [Indictment, H. 5]; 2 Hawkins' Pleas of the Crown, c. 25, s. 116; 2 Chitty's Criminal Law, ch. 9, p. 316. At all events, the law requires a compound penalty partly at common law and partly under 2 Geo. 2, c. 25, s. 2, and the presiding judge has a discretion as to the punishment under the statute, which is to be measured by the penalty which he inflicts pursuant to the common law.

Moreover, that statute by its terms forbids a sentence of penal servitude for a longer period than seven years to be passed. The words of a statute must be strictly followed: *Everett* v. *Wills*. (1) Only one punishment for perjury can be inflicted by the Court in which the defendant is convicted.

A further objection is, that the judgment is bad because the sentence upon the second count is made to begin at a future time. The Court is bound to award a sentence commencing forthwith, and cannot postpone its operation until a future time.

The judgment is also bad on the ground that where a punishment is created by statute, a defendant cannot upon conviction upon an indictment for misdemeanour containing several counts be sentenced to a longer term of imprisonment or penal servitude than the maximum penalty for one offence. The legislature has in express terms authorized this to be done in felony by 7 & 8 Geo. 4, c. 28, s. 10 (2); but no similar statute exists as to mis-

(1) 2 Scott's N. C. 531, per Tindal, C.J.

(2) By 7 & 8 Geo. 4, c. 28, s. 10: "Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment, to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or of transportation, the Court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence to commence at the expiration of the imprisonment or transportation, to which such person shall have been previously

demeanours. In *Rex* v. *Wilkes* (1) there were two informations; here there is one indictment, one trial, one verdict, and one judgment; moreover, in that case the sentence was regulated by the common law, and might be of unlimited duration; it was not as in the present case created and limited by statute. The language of 2 Geo. 2, c. 25, s. 2, evidently contemplates, that only one sentence shall be passed upon a defendant who has been convicted of perjury. The writ of error in this case was granted by the former Attorney General, Sir J. Holker, upon the authority of *The People ex rel. Tweed* v. *Liscomb* (2); this was no doubt the decision of an American court; but it was there held that a defendant convicted upon an indictment for misdemeanour containing several counts cannot be sentenced to a greater punishment than can be passed for one offence. If the principle is right, it is decisive in the present case.

Sir H. James, A.G. (*F. Herschell, S.G., Poland*, and *A. L. Smith*, with him), for the Crown, was directed to confine his argument to the last point urged by the counsel for the plaintiff in error. *The People ex rel. Tweed* v. *Liscomb* (2) was decided chiefly upon the law existing in the State of New York; the case is not an authority in an English court. Surely if two offences of equal gravity are committed, they can be both punished. It cannot be correct to argue that if a man commits perjury in the course of proceedings having one object, he cannot be punished for another perjury committed during the same proceedings. It is lawful to join distinct misdemeanours in the same indictment; and this may be done in felonies subject to the power of the Court to put the prosecutor to his election: *Rex* v. *Galloway*. (3) The reason why before 7 & 8 Geo. 4, c. 28, s. 10, it was not possible to pass a postponed sentence for felony was, that nearly all felonies were formerly capital. *Rex* v. *Robinson* (4) is conclusive to shew that

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sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded."

(1) 4 Burr. 2527; 4 Brown's Cas. in Par. 360.

(2) 15 Sickel's N. Y. C. A. 559.

(3) 1 Mood. C. C. 234.

(4) 1 Mood. C. C. 413.

1880

THE QUEEN v. CASTRO.

consecutive sentences may be passed upon different counts of an indictment, the aggregate of which exceeds the punishment that may be lawfully inflicted for one offence. *Gregory* v. *Reg.* (1) and *Rex* v. *Williams* (2) at least establish this proposition that sentences may be ordered to commence at a future time. The object of enacting 7 & 8 Geo. 4, c. 28, s. 10, was that felonies might be put upon the same footing as misdemeanours: *Reg.* v. *Cutbush.* (3) In the present case the indictment contains two counts charging different perjuries committed at different times in different proceedings upon separate oaths, and if it were not for the Act creating the Central Criminal Court (4 & 5 Wm. 4, c. 36) they could not have been tried before the same tribunal, inasmuch as the venues were different; and as they could be joined in one indictment, the plaintiff in error was lawfully sentenced to a separate punishment in respect of each offence. It is not to be forgotten that the whole presentment of the grand jury constitutes but one indictment: *Rex* v. *Heywood.* (4) No provision in 2 Geo. 2, c. 25, s. 2, prevents the plaintiff in error from being punished for two offences.

Benjamin, Q.C., in reply. Suppose that the plaintiff in error had been tried upon separate indictments for the perjuries charged against him, upon the one indictment at the bar of the Court of Queen's Bench, upon the other at the Central Criminal Court: could it have been contended that he might be sentenced to different terms of penal servitude? And yet one Court cannot have a more extended jurisdiction than two. Even a felon can be only sentenced to a postponed punishment, when he is already undergoing an existing punishment: he cannot be sentenced to consecutive punishments at the same time: 7 & 8 Geo. 4, c. 28, s. 10.

[*Sir H. James, A.G.*, referred to *Reg.* v. *Cutbush.* (5)]

It is doubtful whether the practice there alluded to is consonant with legal principles. The law ought never to be strained in criminal cases, and no enlarged interpretation of criminal statutes

(1) 15 Q. B. 974.
(2) 1 Lea. C. C. 529.
(3) Law Rep. 2 Q. B. 379, at p. 381, per Blackburn, J.
(4) L. & C. 451, at p. 458, per Pollock, C.B.
(5) Law Rep. 2 Q. B. 379, at pp. 381, 382.

ought to be allowed. *Rex* v. *Wilkes* (1) was a case where distinct criminal informations had been filed.

[JAMES, L.J. An indictment containing two counts is in every respect to be treated as two indictments.]

At all events in *Rex* v. *Wilkes* (1) the defendant was charged with misdemeanours at common law, and the amount of punishment was in the discretion of the Court, and it has never been decided that where the punishment of a misdemeanour is limited by statute, a court of justice can inflict a punishment exceeding the maximum penalty allowed by the statute, as has been already pointed out. *Rex* v. *Robinson* (2) is not an authority against the plaintiff in error.

JAMES, L.J. It seems to me that in this case the writ of error has been improvidently issued, except as to one point, which is alleged to be governed by a case decided in the United States. The case for the Crown is established by the practice of the Courts and by the current of authority. It has not been really questioned at the bar that the practice has been to join several counts in one indictment and to put together upon one piece of parchment several charges, upon which men might at one and the same time be tried and convicted. In cases of felony, which with the exception of those to which benefit of clergy was attached were almost all capital offences, it was thought right that an accused man should not be tried upon more than one charge at a time. No such practice has prevailed with regard to misdemeanours; but if the presiding judge saw that the accused might be embarrassed by the number of charges, no doubt he would have compelled the prosecuting counsel to elect upon which charge he would proceed; but the exercise of his discretion upon this point never could be reviewed by writ of error. It being the law that a man might be tried at the same time upon several charges contained in several counts of that same indictment, to my mind no valid reason can be given for drawing a distinction between a trial and conviction upon an indictment charging several misdemeanours and separate trials and convictions upon separate indictments. In the case of

(1) 4 Burr. 2527. (2) 1 Mood. C. C. 413.

1880

THE QUEEN v. CASTRO.

James, L.J.

Rex v. *Wilkes* (1) it was certainly settled by a decision of the House of Lords that for several misdemeanours the subject of distinct informations or indictments, one tried after the other, one sentence of imprisonment might be passed to take effect after the expiration of the other. This rule has been acted on ever since. No judge, no writer, has ever expressed an opinion in England that this practice was inconsistent with the common law of England. It is too late now, after the lapse of a century, to attempt to dispute in this country the propriety of that decision, especially when it has been adopted and acted upon in hundreds, perhaps thousands, of cases since that time. That this was the general rule of law in England does not seem to have been questioned in the case decided in the United States, upon the authority of which the former Attorney General was induced to grant his fiat for a writ of error in the case before us; but it has been argued that that case has introduced an exception, or rather a restriction, upon this general rule. In the case decided in the United States it is laid down that in misdemeanours the law does not permit cumulative sentences to be imposed upon conviction for several distinct offences charged in different counts of a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme limit of punishment for a single misdemeanour. That was the rule laid down by the American Court. It has been in effect conceded that no principle of this kind has been laid down in any case to be found in the English reports, no doctrine of this kind is contained in any treatise on the English criminal law. I think that it must also be conceded—at all events it is to be inferred from what took place in that case itself—that no doctrine of that kind has ever been laid down in any case decided in any of the several states of the United States, which have adopted the English common law as their guide. Are we to follow that Court and to say that it has laid down a proper restriction upon that principle, which up to the time of its decision had always been stated without any restriction or qualification? I have always felt, and I have always spoken with, the most unfeigned respect for the many decisions of the Courts of America which have dealt with matters and principles of law common to

(1) 4 Burr. 2527, at p. 2577.

1880

THE QUEEN v. CASTRO.

James, L.J.

their jurisdiction and ours; but I am bound to say that I am startled by the mode in which the judges dealt with the case which has been cited, both with reference to the authorities and with reference to legal principles. The ratio decidendi adopted by the judges was in substance this: "It is true that no qualification of that kind has ever been laid down in the English Courts or by the English authorities, but then the contrary has never been laid down or even contended for; and we have to look at what the common law of England was in 1775, and we cannot accept anything that has been said or done since 1775 by any court in England, which is inconsistent with the practice prevailing in the courts of this State of New York." That is the ground upon which the judges proceeded, and which they thought sufficient to enable them to get rid of the decision of Court of Queen's Bench in the case before us. That Court has the highest criminal jurisdiction in England. The decision was cited to the judges of the State of New York, but they passed it by as a decision not binding upon them, and treated it as deserving only a passing reference. I cannot help thinking that a decision of that kind pronounced in the State of New York is not in any way binding on us. In the first place, it was the decision of judges overruling the decision of other judges, the former being judges of the Court of Appeal and the latter being judges of the Supreme Court. We cannot measure the weight, which ought to be attached respectively to the judgment of the Supreme Court and of the Court of Appeal. To us the judgments of courts in the United States are merely what our decisions have been to them. To us they are merely the opinions of eminent and learned men on a question of law, which is common to them and to us. Eminent judges have given their opinion one way, and other eminent judges have given their opinion another way; but with regard to the eminent judges of the Court of Appeal who decided *Tweed's Case* (1), they lay down that which is contrary to what has been laid down in the English Courts. What is the principle pursuant to which this limitation or qualification of the general rule is introduced? I am unable to understand the principle suggested, and it is to my mind startling, if not shocking. The principle suggested seems to be this, that if a man commits

(1) 15 Sickel N. Y. C. A. 559.

1880

THE QUEEN v. CASTRO.

James, L.J.

a misdemeanour of so grave a character that the full sentence of the law would be inadequate, he is not to be tried and punished for any other misdemeanour which he may have committed, until after the expiration of his sentence upon the indictment upon which he has been convicted. The inconvenience of this course is obvious. If the trials for the other misdemeanours be postponed until after the expiration of his sentence, he gets the chance of escape from failure of evidence which the lapse of time always brings about. To my mind this proposition is startling, and no authority for it is to be found in the English law. A great deal of the judgments in the Court of Appeal in *Tweed's Case* (1) proceeded upon what is inconsistent with our law. The judges came to the conclusion that it was improper and unjust that a man should be tried for more than one misdemeanour in one indictment, and that seems to have been the governing motive of their decision. These reasons will dispose of the chief point urged in this case.

I do not forget to notice another point which has been urged before us, namely, that the sentence is bad because it did not begin with an additional punishment: in other words, that the sentence is bad because the statute 2 Geo. 2, c. 25, s. 2, directs that the sentence of seven years' imprisonment or transportation (for which penal servitude is now substituted) is to be passed in addition to any punishment, which at the time of passing the statute might be inflicted under the laws then in force. According to this argument the judgment in the Court of Queen's Bench is bad, because in addition to the sentence of seven years' penal servitude, the accused man has not been sentenced to be fined one shilling or imprisoned for one hour. The practice observed by criminal courts as to this point has been, that judges have considered themselves at liberty either to pass or not to pass the additional sentence; the statute has been construed to be permissive, and not compulsory upon criminal courts. If no other punishment than seven years' penal servitude is passed, no harm or injustice is done to the prisoner, and no reason can be suggested why there should be a nominal fine of one shilling or a nominal imprisonment of an hour or a day for the purpose of making valid

(1) 15 Sickel N. Y. C. A. 559.

the sentence of penal servitude actually pronounced. These considerations effectually dispose of the objection, which I have just been dealing with. It is unnecessary, therefore, to rely upon the statutory provision, which would make the objection futile: I allude to the power which this Court has of correcting any technical slip in the judgment and of passing a sentence which will be valid in point of law. (1)

It was further argued, that in truth and in substance the perjuries charged in the two counts constituted but one offence, and that the sentence of fourteen years' penal servitude was awarded for that which was really one perjury. In support of this proposition it was contended that there was one fraud and one imposture, by which the plaintiff in error endeavoured to pass himself off as some other person with the view of obtaining certain lands, and therefore that any number of false statements made on any number of occasions in any number of suits constituted only one perjury, and that one perjury alone could form the subject of a legal sentence. To my mind it is only necessary to state the proposition in order to dispose of it. It is simply monstrous to suppose, that the law allows a man to be punished only once for any number of perjuries which he may commit, merely because they are committed in furtherance of one fraudulent scheme and design. There is no substance in the objection. On the face of this record there is nothing which alleges, nothing from which it can be inferred, that the perjuries were committed in the prosecution of one and the same fraudulent scheme. A modified form of this objection was that the alleged perjuries were committed in only one suit, but it is quite obvious that they were committed in two distinct suits; the one suit was brought in the Court of Chancery for one specific object, although it might be ancillary to the action at common law, and in that suit one set of false statements was uttered in violation of an oath taken in the course of it; the other set of false statements was uttered in another place, at another time, in violation of an oath taken before another tribunal, namely, the Court of Common Pleas, during the trial of an action of ejectment. It is perfectly idle to suggest that these two sets of false statements constituted but

(1) See 11 & 12 Vict. c. 78, s. 5.

1880

THE QUEEN v. CASTRO.

James, L.J.

one and the same perjury, or that there is no legal power to pass more than one sentence for those distinct perjuries.

These are all the objections really urged before us. In my opinion there is no weight in any of them. The sentence of fourteen years' penal servitude was warranted by law: we have nothing to do with its length; that was for the exercise of the discretion of the Court of Queen's Bench. No error has been shewn to exist upon this record.

BRAMWELL, L.J. I have very great doubt whether I ought to occupy further time by expressing any opinion upon this case. I am quite certain that the writ of error was not allowed to issue without a due degree of care and caution on the part of the former Attorney General. I think that he was warranted in allowing it to issue by the American case which has been cited, but now that it is before us, I think it one of the plainest cases that have ever come before a court of justice.

The first point made on behalf of the plaintiff in error, as I understand it, was, that if a man brings a suit, or several suits, with a view to establish a certain proposition which will entitle him to certain property, although he may tell an infinite number of untruths upon his solemn oath or upon more than one solemn oath, at a distance of time from each other, and varied in form as much as they can be, he commits but one perjury, because the substance of his statement is this, "I am the person entitled to that estate;" and, therefore, that if he says at one time under one oath, "I seduced a particular woman," it really only means, "I am the person entitled to that estate," and is a mere modification of the same statement and a varied way of putting it; and that, if he afterwards says, "I was placed at a particular school," that, again, merely means, "I am the person entitled to the estate," and is a mere modification of the mode of stating the proposition. I really should have though it impossible that such an argument as that could be presented in a court of justice. The counsel for the plaintiff in error were driven to admit that, according to their argument, if a man were indicted and convicted of having made a false statement upon oath, he would have power to make with impunity as many false statements with reference to the same

subject-matter as he pleased. It is enough to state the proposition to perceive that it cannot be true. It was argued that it would be monstrous that a man should be punished twice for what was practically one perjury. To my mind it would be monstrous, if he could not be punished twice. On the contrary, I think that if, unwarned by the first prosecution, he persists in the crime of perjury by telling fresh untruths, not only ought he to be punished again, but he ought to be punished more than he was upon the first occasion. I can understand that if a witness at the beginning of an examination said, "I am A. B.," and at the end repeated the words, there might be injustice in saying that he had committed two perjuries: possibly it might be also unjust to charge him with two perjuries, if he had merely repeated the statement at some interval of time. But suppose that a witness were to say falsely, with the view of proving an alibi, "I saw the prisoner upon a certain occasion," and suppose that he afterwards were to say upon his oath that he had not been convicted of felony, when in truth he had been so convicted: I see no reason why he should not be punished twice for the two distinct false matters to which he pledged his solemn oath. I need not say more upon this point: the argument is wholly unsustainable which has been addressed to us upon behalf of the plaintiff in error.

The next point urged before us was that since the statute 2 Geo. 2, c. 25, s. 2, as varied by subsequent legislation, says that a person guilty of perjury may be sentenced to seven years' penal servitude, he cannot have further punishment awarded to him for additional perjuries. As I understand the argument, it is founded upon the language of the statute, which, after containing the provision which I have mentioned, does not go on to say that if he commits perjury again he shall be again subject to punishment. Such an argument might be used with regard to almost every crime, the punishment of which is regulated by statute. What was meant by 2 Geo. 2, c. 25, s. 2, was that for every time a person commits perjury, he shall be subject to the punishment therein provided. I cannot help regretting that such an argument should have been addressed to us.

The next point I understand to be this: the plaintiff in error

1880

THE QUEEN v. CASTRO.

Bramwell, L.J.

has been sentenced to seven years' penal servitude upon each count; but he ought in addition to that to have been sentenced to some amount of fine and imprisonment. I very much doubt whether he has any right to make such a complaint as that upon error, even if the objection were sustainable when urged upon behalf of the Crown. He cannot say that any wrong has been done to him. The utmost that he can say is that he has not had sufficient punishment awarded to him, and I very much doubt whether error will lie at the suit of the person indicted under these circumstances. Suppose that a statute were to enact that a person guilty of a particular offence should be fined and imprisoned, and suppose that a person convicted of that offence were to be sentenced to imprisonment but that no fine were to be awarded: I very much doubt whether the offender could complain that he had not been fined a shilling: it however seems to me unnecessary to decide this point, because upon the true construction of 2 Geo. 2, c. 25, s. 2 it was not imperative that any fine or imprisonment should be inflicted. The statute uses the words "over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being:" these words seem to me to indicate, that the Court need not pass any other sentence than that prescribed by the statute. But there is another argument, which to my mind is conclusive. The counsel for the plaintiff in error were compelled to admit that an hour's imprisonment and the fine of one shilling would have satisfied the statute: is it conceivable that the statute has rendered it necessary to inflict such a punishment as that? I cannot think so. I am satisfied that there is no weight in the objection which I am considering, although it is not so hopeless as those which I have already noticed.

Whether it would be lawful to pass a sentence on a person not already under sentence to commence on a future day, need not be discussed: I am not prepared to say it would not be; I incline to think it would. But unless for some sufficient reason it would in my opinion be unreasonable, and what I suppose may be called unconstitutional. But where there is a necessity for a deferred sentence, there must be a power to pronounce it. In my opinion there is such a necessity, when the prisoner is already under

sentence or has to receive two sentences for offences, and concurrent sentences would not be adequate.

With these prefatory remarks I come to that matter which no doubt formed the chief reason why this writ of error was allowed to issue, and that is that there can be no cumulative punishments to the full extent allowed by law for one offence where two offences are joined in two different counts of the same indictment. The effect of the objection is that although the counts may and, as in the present case, do charge different offences, yet the person indicted cannot upon conviction be sentenced upon one count to a punishment of the full duration allowed by law, and upon another count to a like punishment for a second term beginning at the expiration of the first term. This proposition seems to me very remarkable. It is certain that in the case of separate indictments for felony it is lawful by 7 & 8 Geo. 4, c. 28, s. 10, to pass a sentence of imprisonment or penal servitude to commence at the expiration of a previous sentence, and it is clear from numerous authorities, the chief of which is *Rex* v. *Wilkes* (1), (I need not go through them), that the same course may be taken in cases of misdemeanour: no authority to the contrary can be produced either from the dicta of judges or from the text-books of writers upon law. The proposition has been stated by the counsel for the plaintiff in error somewhat in this shape: there may be different punishments upon two different counts, one of them commencing upon the expiration of the other, provided the two together do not exceed the maximum which the law would allow for each offence in each of the counts; for instance, in the present case there might be a sentence of five years' penal servitude on the first count of the indictment, and a sentence of five years' penal servitude on the second count to commence from the expiration of the second year of the first period of punishment, because that will make the term of seven years altogether, the maximum term of penal servitude allowed by law upon an indictment for perjury containing one count. By the provisions of Magna Charta and the Bill of Rights judges are restrained from giving inordinate punishments; but as the common law has not drawn a limit to the punishment which may be inflicted for a misdemeanour, even

(1) 4 Burr. 2527.

1880

THE QUEEN v. CASTRO.

Bramwell, L.J.

according to the proposition urged before us no difficulty arises as to a conviction upon an indictment for misdemeanour at common law: the defendant might be sentenced at common law to seven years' imprisonment and a fine upon the first count, and to seven years' imprisonment with or without a fine upon the second count, to commence at the expiration of the sentence upon the first count. But it is urged that when a statute has prescribed a punishment for an offence, it draws a hard and fast line which cannot be transgressed within the limits of one indictment. It has been in effect contended that inasmuch as a statute prescribes seven years' penal servitude as the maximum amount of punishment which may be awarded, although there may be twenty counts for twenty distinct offences each deserving seven years' penal servitude, yet the total punishment must not exceed seven years' penal servitude. In support of that proposition has been quoted a case decided in the Court of Appeals in New York; a great many authorities from the English courts were cited in the course of it; but I think it manifest that the judges who decided it did not understand the practice followed in England of quashing indictments, which are right on the record, which present no ground for error, but which it is right for the judge in the exercise of his discretion to quash as a matter of fair dealing towards the defendant; and probably the judges of the Supreme Court whose decision was reversed were as learned and entitled to as much consideration as the judges of the Court of Appeal; but, however that may be, with the exception of that case there is not a shadow of authority for the proposition, and no reason can be given why it should be adopted. Let me point out to what consequences it leads. I will begin by premising that if two offences committed on totally different occasions are joined in the same indictment, the presiding judge would probably order it to be quashed; for instance, if a person were charged in one count with having committed perjury in an action upon a bill of exchange brought against him by A., and in another count with having committed perjury in an action brought against him by B., the probability is that the judge would not permit those charges to be joined, but would either quash the indictment or put the prosecutor to his election. But I will suppose a case like the present where the perjuries, although

committed upon different occasions, relate to the same subject-matter, and I will suppose that each of the offences is deserving of seven years' penal servitude. Is the Crown to prosecute for one offence, and after the defendant has been convicted to wait for seven years before it prosecutes for the other? This, however, is the preposterous result of the argument for the plaintiff in error. Or is the Crown to prosecute upon two separate indictments? And if it does, what is to happen then? Is judgment to be respited upon the second indictment, until the first period of imprisonment is over? Surely the Crown ought to do what is reasonable and consistent, what it has done in the present case, namely, when two offences of the same character are alleged to have been committed, to join them in separate counts of the same indictment, and it cannot be said that the defendant, if convicted, ought to receive the punishment for one offence only. I am of opinion that no reason in law can be assigned why the plaintiff in error should receive punishment for only one act of perjury; the authorities are entirely opposed to a proposition of that kind; and therefore I think that the judgment of the Court below must be affirmed.

BRETT, L.J. I have listened very attentively to the argument which has been addressed to us on behalf of the plaintiff in error; but it has failed to produce any effect upon my mind.

Two objections to the judgment have been chiefly relied upon in the present case: one of these, if it had been well-founded, would have been fatal even although there had been only one sentence of seven years' penal servitude; the other objection only arises because two terms of seven years' penal servitude were passed; nevertheless if it had been valid, it would have existed from the moment when the sentence was passed. I cannot help remarking as to both these objections that, notwithstanding all the attention which has been naturally attracted to this case, they are now brought forward as having existed from the time when the sentence was passed; nevertheless they do not appear to have presented themselves to the mind of any person until several years had elapsed since judgment was pronounced. It seems to me that this circumstance shews that the opinion of the legal profession was wholly against both these objections. However, as

1880

THE QUEEN v. CASTRO.

Brett, L.J.

they are now brought forward, they must be dealt with and disposed of.

As to the first objection which I have mentioned, it is urged that even although there had been only one sentence of seven years' penal servitude, it could not have been sustained in error, because it was not preceded by a nominal sentence of fine and imprisonment. As has been pointed out, it is an objection of no consequence, for we have power to amend it by passing a proper sentence. (1) The objection, therefore, is merely formal; nevertheless I think it important that we should give our opinion upon the true construction of 2 Geo. 2, c. 25, s. 2. I am of opinion that that section is an enabling enactment and gives to the presiding judge power either to add transportation to the sentence which might be passed according to the laws then in force or to give a sentence of penal servitude in substitution for it. The proper construction of the words at the beginning of sect. 2 of 2 Geo. 2, c. 25, seems to me to point to this conclusion; but reliance has been placed upon the words "and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being;" if the words had been "besides such punishment as was formerly inflicted" possibly the argument on behalf of the plaintiff in error might have prevailed; but the words actually used seem to me to be a strong indication that the argument is not correct; the true view is that the presiding judge may award any punishment previously allowed, and may also give the punishment allowed by the statute in addition: if he does not award any punishment previously allowed by law, he may give the statutory punishment in substitution for it. It is obvious to my mind that the presiding judge has power to give imprisonment under the previously existing law, and to add to it penal servitude under this statute; but that does not shew that he is obliged to add the one to the other, or that he may not give one in substitution for the other. Our construction of the section is that it is an enabling enactment, and that it does not oblige the presiding judge to add one punishment to the other.

(1) See 11 & 12 Vict. c. 78, s. 5.

I come now to the objection upon which the greatest stress was laid. In order to support it, the counsel of the plaintiff in error argued that in the present case there were not in reality two offences, but only one. It is not necessary to consider whether there could be two perjuries at one trial upon one oath; for in the case before us there were separate perjuries in respect of two oaths taken before different tribunals, and it seems impossible to shew that they were not separate perjuries. I have no doubt that the plaintiff in error committed two distinct and separate offences. It was further urged that as the two offences were joined in one indictment, they for that reason ought to be treated as one offence, although there are separate counts; and it was suggested that although distinct punishments might be given upon separate indictments, yet this could not be done where there was one indictment with separate counts. This was in effect to suggest that separate counts charging separate offences in one indictment are not equivalent to separate indictments. For a very long period of time it has been again and again decided in England that where separate offences are charged in different counts of the same indictment, the legal result is the same as if they had been charged in separate indictments. It was said that counts alleging separate offences could not be joined in indictments for felony; but in point of law they may be joined, and it is no objection upon a writ of error that two felonies are charged in the same indictment. The only question is for the discretion of the Court, whether the presiding judge would quash the indictment, or at least would put the prosecutor to his election as to which of the felonies he would proceed upon. It was further urged that the punishment could not be considered to have been inflicted pursuant to 2 Geo. 2, c. 25, s. 2, because the counts did not at the end thereof charge that the offences were committed contra formam statuti; but apart from legislative provisions (1), that seems to be an invalid point, because the punishment is no part of the indictment, which contains nothing but the allegation that the offence has been committed; and if the offence had been created by statute, the conclusion contra formam statuti must formerly

(1) 14 & 15 Vict. c. 100, s. 24, provides that no indictment shall be held insufficient "for want of a proper or formal conclusion."

1880

THE QUEEN v. CASTRO.

Brett, L.J.

have been inserted, but otherwise it need not. We therefore come to the question whether in an indictment for misdemeanour containing two offences, the commencement of the punishment for one of them can be postponed until the punishment of the other is ended. I confess that this seems to me to have been decided by an authority which we have no right to question, that is, by the House of Lords. The counsel for the plaintiff in error naturally attempted to get rid of the force of the answer by the judges in the House of Lords by referring to the circumstances, under which *Rex* v. *Wilkes* (1) was decided. But when the judges were consulted by the House of Lords, they were asked an abstract question; and the question which they were asked was whether a sentence of imprisonment, to commence from and after the termination of an imprisonment to which the defendant had been before sentenced for another offence, was good in law. It is to be observed that the answer has no reference as to whether the sentences were passed for offences charged in one indictment or in separate indictments. The question was general in its terms, and the judges answered the question put by the House of Lords in the very words in which it was asked, and that answer was that a judgment of imprisonment against a defendant may commence from and after the determination of an imprisonment, to which he was before sentenced for another offence. Ever since that answer was given in the House of Lords, it has been taken to be an exposition of the law with respect to misdemeanours, and it is wholly irrespective of the consideration whether the offences are charged in one indictment or in two. As to the practice which has been followed since *Rex* v. *Wilkes* (1), I may refer to *Rex* v. *Rhenwick Williams* (2), where the prisoner was convicted upon three indictments, and the operation of the sentences upon two of them was postponed. I may remark that the expression "cumulative punishments" seems to me incorrect. It is true that in *Rex* v. *Wilkes* (1), from the form in which the question was put to the judges, and from the manner in which it was answered, the judges appear to confine the possibility of postponing a sentence to instances, where other sentences are already in existence at the time when the deferred sentence is passed, and they seem to have

(1) 4 Burr. 2527. (2) 1 Lea. C. C. 529, at p. 536.

held that if no sentence exists to which another can be postponed, it is not lawful in England to sentence a person to a term of imprisonment to commence at a subsequent time. They appear to have thought that the postponed sentence must take effect before the defendant is totally dismissed from the power of the Court: *Wilkes* v. *Rex.* (1) I do not know whether this limitation is correct, if indeed it was really intended to be laid down; and it is unnecessary now to consider it, inasmuch as the question is immaterial to the present case. Besides *Rex* v. *Rhenwick Williams* (2), other cases are to be found in which the principle laid down in *Rex* v. *Wilkes* (3) has been carried out: I may mention *Gregory* v. *Reg.* (4), which is a remarkable case, and *Rex* v. *Robinson.* (5) Therefore several authorities exist shewing that deferred sentences can be passed, whether there are separate indictments, or whether there is only one indictment containing several counts.

But it has been argued on behalf of the plaintiff in error that, even if deferred sentences can be passed upon different counts of the same indictment for a misdemeanour, they must not exceed the punishment allowed by law for one offence. By 7 & 8 Geo. 4, c. 28, s. 10, power is given to pass a postponed sentence for felony, and it is expressly provided that the aggregate term of imprisonment or transportation may exceed the term for which either of those punishments could otherwise be awarded. It has been contended that because that enactment was requisite with respect to felonies, the proper inference was that the power to pass sentences upon one indictment exceeding the term of punishment allowed for one offence did not in misdemeanour exist at common law. I cannot agree that this is the inference which ought to be drawn. It is to be recollected that 7 & 8 Geo. 4, c. 28, s. 10, was passed long after the answer of the judges was given in *Rex* v. *Wilkes* (6), and I draw the inference that misdemeanours were not dealt with by statute, because the legislature was of opinion that as to them the requisite power already existed, and that the enactment was passed because doubts had been felt as to the power to pass deferred sentences in cases of felony. And the fact of 7 & 8 Geo. 4,

(1) Wil. Opin. 334.
(2) 1 Lea. C. C. 529, at p. 536.
(3) 4 Burr. 2527.
(4) 15 Q. B. 974.
(5) 1 Mood. C. C. 413.
(6) 4 Burr. 2527, at p. 2577.

1880

THE QUEEN v. CASTRO.

Brett, L J.

c. 28, s. 10, having been passed is really an argument against the plaintiff in error upon referring to the remark made by Blackburn, J., during the argument in *Rex* v. *Cutbush* (1); the learned judge there says that the statute was passed in order to put the law upon the same footing with regard to felonies as it was with regard to misdemeanours. The enactment cannot be limited to a case where the person convicted of felony is already in prison under a sentence; in order to put the enactment into operation, it is not requisite that he should have been already confined in a gaol pursuant to the order of a court; for immediately that a person has received a sentence, he is in prison under that sentence. The date for the commencement of the imprisonment of a person convicted at the assizes is usually a day or two or perhaps more before the day when the sentence is actually pronounced; and the real meaning of 7 & 8 Geo. 4, c. 28, s. 10, is that with regard to felonies a sentence may be postponed for one offence until after the completion of a sentence for another, although the aggregate term of imprisonment may exceed the term for which either of those punishments may be awarded. There is, therefore, a great amount of authority to shew that the legislature merely intended to put the law upon the same footing with regard to felonies as it already was with regard to misdemeanours.

I must notice the circumstance that the legislature has thought fit to enact that three charges of certain kinds of felony such as larceny and embezzlement (24 & 25 Vict. c. 96, ss. 5, 71), may be included in the same indictment; and this has been relied upon as shewing that at common law separate offences cannot be joined together; but I think that a satisfactory answer may be given to this argument, namely, that the statutory provisions alluded to relate wholly to procedure and do not extend to punishments; they merely take away the power of quashing the indictment or of putting the prosecutor to his election, and they have no greater effect.

Our view has been attempted to be met by *The People ex rel. Tweed* v. *Liscomb*. (2) I need hardly say that I am always anxious to hear if there be any American decisions bearing upon the question before me, not because they are binding authorities upon me,

(1) Law Rep. 2 Q. B. 379, at p. 381. (2) 15 Sickel's N. Y. C. A. 559.

but in order that I may get the very great assistance which I have over and over again derived from the decisions of accomplished judges, who are dealing with what is very much the same law as our own; I have therefore endeavoured to ascertain what were the reasons upon which the decision was founded. The proposition relied upon seems to be this: Where one of two sentences of imprisonment is ordered to commence at the termination of the other, the two terms of imprisonment taken together shall not exceed the extreme limit of punishment for one offence. It sounds a strange proposition when it is enunciated. It derives no assistance from 2 Geo. 2, c. 25, s. 2, because that statute provides that any person convicted of perjury may be sentenced to seven years' penal servitude; the words "convicted of wilful and corrupt perjury" are used, and surely they must mean "convicted of a wilful and corrupt perjury;" and it follows from this that if there be two perjuries, a sentence of penal servitude can be awarded in respect of each of them. I have examined the judgments in *The People ex rel. Tweed* v. *Liscomb* (1) and I cannot find any valid reason either in form or in substance suggested for the determination at which the judges arrived. Therefore I cannot treat this case as a guide in coming to a conclusion in the case before us. In favour of the argument for the Crown upon this point authority of English judges may be found. All English lawyers know that the opinion of Patteson, J., ought to be treated with the highest respect, and the irresistible inference from what he said in *O'Connell* v. *Reg.* (2), is that in his opinion where one sentence is postponed to another it is no objection that the two sentences taken together exceed the whole punishment which might be awarded for one offence. To my mind *Rex* v. *Robinson* (3) is a clear authority. The indictment contained two counts for passing false coin, and the defendant was sentenced to two years' imprisonment: the judges held that this sentence was wrong, but they stated that a sentence of one year's imprisonment might have been passed for each offence, and that the commencement of the second might be postponed until the termination of the first. It is true that this statement was not, technically, part of the decision; but

(1) 15 Sickel's N. Y. C. A. 559. (2) 11 Cl. & F. 155, at pp. 260, 261.
(3) 1 Mood. C. C. 413.

1880

THE QUEEN v. CASTRO.

Brett, L.J.

it is hard to conceive a more deliberate judicial opinion. I will again mention the opinion of Blackburn, J., in *Reg.* v. *Cutbush* (1); it seems to me a strong authority to show that in cases of misdemeanour the aggregate of separate punishments for separate offences may be greater than the punishment which could be inflicted for any one of them.

Therefore, notwithstanding the able argument which has been addressed to us, it seems to me that on principle and authority this case is clear, and that the judgment of the Court of Queen's Bench was in law absolutely right.

Judgment affirmed.

Solicitor for plaintiff in error: *Edmund Kimber.*
Solicitor for the Crown: *Solicitor to the Treasury.*

Aug. 6.

[IN THE COURT OF APPEAL.]

WILSON *v.* LORD BURY AND OTHERS.

Company—Director—Shareholder—Contract—Trust.

A company had been formed for the purpose of receiving money from depositors and investing it upon security. The defendants were directors of the company. The plaintiff deposited with the company the sum of 1000*l.* upon the terms that it should remain in their hands for five years, that they should meanwhile pay him interest at the rate of 6 per cent., that by way of security they should transfer to him a mortgage made to them, and that if the mortgage should become ineffective before the expiration of the five years they would replace it by another. The mortgage, upon which the 1000*l.* belonging to the plaintiff was secured, was paid off before the expiration of the five years, but the company did not replace it by another, and dealt with the proceeds as part of the funds of the company. The company ultimately went into liquidation, and the plaintiff then sued the defendants to recover from them the sum of 1000*l.* paid by him to the company, on the ground that it was lost to him by reason of the defendants' gross negligence. At the trial it was proposed to show that, at the time when the mortgage securing the plaintiff's 1000*l.* was paid off, the company was insolvent: the judge rejected the evidence, directed the jury to find for the defendants, and entered judgment for them:—

Held, per Bramwell and Brett, L.JJ. (Baggallay, L.J., dissenting), that the ruling of the judge at the trial was right, and that the judgment must be affirmed.

By Bramwell, L.J., that if a trust had been created between the plaintiff and

(1) Law Rep. 2 Q. B. 379, at p. 381.

the company, the defendants, as directors, could not be held personally responsible for a breach of it.

By Brett, L.J., that a contract, and not a trust, existed between the plaintiff and the company, and that the defendants could not be held liable as constructive trustees for aiding and abetting in the breach of a trust.

By Baggallay, L.J., that the relation of trustee and cestui que trust existed between the company and the plaintiff, that a breach of trust had been committed by the company, that the defendants were parties to the breach of trust, and that the evidence rejected at the trial ought to have been admitted, as it tended to shew whether the defendants had derived any personal benefit from the breach of trust.

RULE for a new trial granted by the Court of Appeal on the ground of misdirection and improper rejection of evidence, upon appeal from the Queen's Bench Division.

The facts and the proceedings at the trial are fully stated in the judgment of Brett, L.J., and the arguments are sufficiently noticed in the judgments of the Lords Justices hereafter set out.

June 23, 26, 28. *Sir J. Holker, Q.C.* (*Lumley Smith, Q.C.*, with him), shewed cause on behalf of the defendant Lord Bury.

Sir H. James, A.G. (*R. T. Reid*, with him), shewed cause on behalf of the defendant Montgomerie.

Whitehorne (*C. Russell, Q.C.*, and *Silvester*, with him), supported the rule.

In addition to the authorities commented upon in the judgment of Brett, L.J., the following cases were cited during the arguments: *In re Wincham Shipbuilding, Boiler, and Salt Co., Hallmark's Case* (1); *Pickering* v. *Stephenson* (2); *Rhodes* v. *Forwood* (3); *Betts* v. *De Vitre* (4); *Stewart* v. *Austin* (5); *Land Credit Co. of Ireland* v. *Lord Fermoy* (6); *Ashurst* v. *Mason*. (7)

Cur. adv. vult.

Aug. 6. The following judgments were delivered:—

BRETT, L.J. In this case the plaintiff sued Lord Bury, Mr. Montgomerie, and Mr. Muckleburgh, as directors of a company called the Colonial Trusts Corporation, Limited, to recover the

(1) 9 Ch. D. 329.
(2) Law Rep. 14 Eq. 322.
(3) 1 App. Cas. 256.
(4) Law Rep. 3 Ch. 429, at p. 442.
(5) Law Rep. 3 Eq. 299.
(6) Law Rep. 8 Eq. 7.
(7) Law Rep. 20 Eq. 225.

1880

WILSON v. LORD BURY.

Brett, L.J.

sum of 1000*l*. The statement of claim founded the plaintiff's alleged right of action on a charge of gross negligence by the defendants. The defendant, Muckleburgh, did not appear to the action. The case as against the other defendants was tried before the Lord Chief Justice of England and a jury. The Lord Chief Justice at the end of the case directed the jury to find for the defendants. The Queen's Bench Division refused to grant a rule for a new trial on the ground of misdirection or improper rejection of evidence. Upon appeal a rule nisi was granted by the Court of Appeal, as for misdirection and an improper rejection of evidence, against which cause was afterwards shewn. The ultimate question is, whether upon the evidence which was given, or upon that and what was rejected, if it was improperly rejected, a jury could have been properly allowed to give a verdict in favour of the plaintiff.

The evidence given was that the company called the Colonial Trusts Corporation, Limited, was a company incorporated in order to replace a company called The Colonial Securities Company, Limited. The memorandum of association of the new company stated the objects for which it was established, and among others that it was established for (3) the lending and investing money, whether belonging to the company or entrusted to the company, as agents for other companies or persons; (4) the securing by guarantee, or otherwise, the repayment of moneys invested on securities, whether such investments be made through the agency of the company or not; (5) the negotiating loans, managing properties, collecting and receiving rents, and transacting all manner of agency and commission business; (6) the acquiring and dealing with land in England or elsewhere. The capital of the company was to be 300,000*l*. in 60,000 shares. The articles of association, after giving to the directors the management of all the affairs and business of the company, gave them power in terms (C) to invest the moneys of the company, or moneys entrusted to the company for that purpose, in any securities, or in any manner which they may think fit, except by purchasing the shares of the company, and to realize and deal with the securities and investments of the company at their discretion; (D) to borrow on behalf of the company such sums of

money as they deem advisable for any of the objects or purposes of the company, at such rate of interest, and generally on such terms and conditions as they may from time to time think fit, &c.; (E) to secure the repayment of any moneys so borrowed, and the payment of interest thereon in such manner, &c.; (F) to guarantee the repayment of money lent, and the payment of interest on money lent, either together or separately, whether the loans are effected through the agency of the company or not. The directors were to cause true accounts to be kept (A) of all sums of money lent or advanced by or through the company, and of the matters in respect of which, and the securities upon which the same were respectively lent and advanced; (B) of all sums of money borrowed by or through the company, and of the matters in respect of which, and of the securities upon which the same were respectively borrowed. Muckleburgh was appointed the managing director, Montgomerie a director, Lord Bury chairman and director. Assuming to act under the authority thus given to them, the directors issued a "prospectus" which stated that "the corporation acts as agent for the investment of money in large or small sums, for not less than five years, in first mortgages on freehold lands of ample value, and with registered titles, in Canada and other colonies, guaranteeing the principal and also interest at the rate of 6 per cent. per annum, payable half yearly, on 1st January and 1st July. . . . . Applications for mortgages, &c., may be made in the annexed form. . . . . First mortgages on freehold real estate for fixed periods issued at par. . . . . To the directors, &c., I herewith remit to you *l.* to be invested for years in first mortgages on freehold real estate in Canada; interest at the rate of 6 per cent. per annum to commence from the date when you receive the money." The plaintiff in answer to such a prospectus filled up such a form on the 3rd of March, 1874, with the sum of 1000*l.* and for five years. A memorandum was attached to such application by the plaintiff's brokers, "Application for 1000*l.* 6 per cent. mortgage, for five years." On the same day a receipt was given by and accepted from the company: "Received of A. Wilson, Esq., the sum of 1000*l.* for investment for five years, at 6 per cent., on mortgage in the colonies, effected through this company."

1880

WILSON v. LORD BURY.

Brett, L.J.

The following documents then passed:

"Transfer of mortgage . . . . This indenture, made the 6th of March, 1874, between the Colonial Company, Limited, and A. Wilson, witnesseth that in consideration of the sum of 1000*l.* paid by the transferee to the company, the company doth hereby grant and assign to the said transferee, &c., all that mortgage debt, amounting to 1000*l.*, secured by the indenture of bargain and sale by way of mortgage, dated the 29th of August, 1873, made between Catherine Dill of Pietermaritzberg in Natal and the company, and all interest henceforth to become due for the same according to the terms of the said mortgage. And in consideration of the said company being permitted to receive and retain for its own use all sums payable in respect of interest on the said indenture of mortgage over and beyond the rate of 6 per cent. per annum, the said company doth hereby guarantee the payment to the said transferee of the said mortgage debt and of interest thereon in the meantime at the rate of 6 per cent. per annum, payable half yearly, on the 1st of January and the 1st of July. And it is further agreed that the company, as the agent, and on behalf of the transferee, shall collect and require payment of the said mortgage money and interest. And it is further agreed and declared that until payment to the said transferee of the said mortgage money and interest, the company stands seised of the legal estate in the lands comprised in the said mortgage in trust for the transferee, &c." To this was added a receipt: "Received of A. Wilson, Esq., the sum of 1000*l.* for investment on mortgage in the colonies for five years."

"Mortgage bond, dated the 29th of August, 1873. Know all men, &c., that N. R., as attorney for Catherine Dill, declared that the said C. Dill was indebted to T. Shepstone, as trustee for the Colonial Securities Company, in the sum of 1000*l.*, for money lent to be repaid to the said company or assigns, with interest at 6 per cent., payable half yearly, on the 30th of June and the 31st of December, until paid off, which payment the borrower shall be allowed and obliged to make at the expiry of two years: and for security a mortgage of land, &c.: and the principal may give three months' notice previous to the expiry of the said bond to the mortgagees of her intention to pay off, &c., otherwise to be

subject to twelve months' notice on either side after the expiry of such bond, to wit, the 23rd of August, 1875."

"Guarantee of principal and interest to investor, A. Wilson. Principal, 1000*l.* Interest at 6 per cent. per annum. In consideration of the deduction hereinafter mentioned from the amount of interest payable under the indenture of mortgage, the particulars of which are specified on the other side, the Colonial Trusts Corporation, Limited, do hereby guarantee to A. Wilson the payment, at the registered office in England of the company, of the principal sums for the time being secured by the said indentures respectively, and also of the interest upon the said principal sums, &c., until such mortgages shall have expired, been foreclosed, or otherwise discharged in course of law, such principal to be paid within two months after the date when the same shall become due in Natal, &c. And in consideration of the aforesaid guarantee the said A. Wilson hereby authorizes the said company to collect the principal moneys and interest for the time being secured by and payable under the said indentures, and thereout to deduct and retain for the use of the said company all sums by way of interest under the said indenture of mortgage over and above 6 per cent., and in case of default to take all necessary proceedings.

Mortgage.	Maturity.	Mortgagor.	Investor.	Amount of Principal Money secured.
29th August, 1873.	23rd August, 1875.	Catherine Dill.	Colonial Trusts Corporation.	1000*l.*

N.B.—"The mortgage has been transferred by deed, dated the 6th of March, 1874, to A. Wilson.

N.B.—"The guarantee to be conditional on the investor whenever required giving such powers of attorney, &c., as &c., for enabling the company to enforce the covenants of the above indenture, and to cease whenever such parties shall decline to give or shall revoke such powers, &c."

From the time of forwarding the 1000*l.* until the company went into liquidation the plaintiff was paid the stipulated interest at

1880

WILSON v. LORD BURY.

Brett, L.J.

6 per cent. On the 16th of April, 1877, Shepstone, the agent of the company in Natal, wrote to the secretary of the company in London a letter, in which, after setting out a personal claim for remuneration, he stated "I have in hand some of the securities, company's funds (not that of the company's principals), and I have applied portion towards paying me a fair remuneration, &c. I enclose detailed account, by which you will see, &c. I also enclose statement of account shewing the receipt of the amount of Dill's bond, and bank draft for 678*l.* 4*s.* 3*d.* transmitting to you the balance." The letter enclosed an account of Shepstone's personal claim, amounting to 815*l.*, and the following:—

"The Colonial Trusts Corporation, Limited, to Shepstone.

By principal sum of C. Dill's bond, 1500*l.*

	£	*s.*	*d.*	
To amount of act. herewith .	815	0	0	
Draft herewith	678	4	3	1500*l.*"
Exchange on do.	6	15	7	

and a bank draft. The proceeds of the draft were paid by the secretary into the company's general account at their bankers. The company kept no separate account at the bank of moneys paid to them by customers, in respect of which the principals received mortgage securities. The company's ledger had an entry of the transaction with the plaintiff stating that his security was Dill's mortgage in Natal. The defendants were, by entries in the minute-book, shewn to have been present at meetings of the directors, when the letter from Shepstone was entered as read, and when the company's books were accessible, and when the company's pass-book shewed the receipt of the proceeds of the bank draft. No other evidence was given or proposed of the knowledge of Lord Bury or Mr. Montgomerie of any part of the above transactions. A balance sheet, dated 31st of December, 1877, which had accompanied a report of the directors to a general meeting of the company held on the 7th of June, 1878, was put in evidence. In the profit and loss account there was an item on the debit side "directors' fees 1000*l.*" No other evidence was given as to any payment of fees to the two directors, Lord Bury and Mr. Montgomerie. In 1878 the company went into liquidation. The plaintiff called as a witness Mr. Kemp, the official

liquidator, and proposed to shew by his evidence, founded exclusively on an examination of the books and vouchers, that at the time of the payment into the bank of the proceeds of the bank draft from Shepstone, in 1877, the company was in fact insolvent. The plaintiff did not offer to shew that this insolvency was in fact known at that time to the two directors. No other evidence of any kind was offered which was rejected. The objection as to rejection of evidence must be confined to the rejection of this evidence alone. The Lord Chief Justice rejected the proposed evidence on the ground that it was immaterial. No notice was given to the plaintiff that Dill's mortgage had been paid off. No substituted security was given or offered to the plaintiff. No further evidence was offered as to the personal knowledge or interference of the two directors in any part of the transactions. The Lord Chief Justice thereupon directed the jury that there was no sufficient evidence on which they could legally find a verdict for the plaintiff, directed them to find for the defendants, and entered judgment for the defendants.

Upon this evidence it is clear that there was at least a contract between the company and the plaintiff, that the company would on payment off of the mortgage debt due from Catherine Dill to the company give to the plaintiff another mortgage security equal to so much of Dill's mortgage as had been transferred to the plaintiff, that such contract had been broken by the company, that the plaintiff would at least have been entitled to sue the company, if it had remained solvent, for such breach, and that the plaintiff would have been entitled during the five years to insist on a specific performance of the undertaking to give him another mortgage, and at the end of five years to recover 1000*l*. It is clear that there was no contract between the plaintiff and the defendants personally to the like effect. It is equally clear that there was no contract of principal and agent between the plaintiff and the defendants personally. These matters have been too often decided to require further discussion. It was strenuously urged on behalf of the plaintiff that the defendants were as a necessary consequence of their position as directors of the company personally trustees of the plaintiff and had been guilty of a breach of trust. Being clearly of opinion, as above stated, that there was

1880

WILSON v. LORD BURY.

Brett, L.J.

no contract between the plaintiff and the defendants, and that there was not the relation of principal and agent between the plaintiff and the defendants, the question is whether there was the relation between the cestui que trust and trustee. I know of no principle or authority for saying that such a relation can be constituted by any agreement or any intercourse between the parties less direct than the agreement or intercourse, which forms the relation of principal and agent. As the agent of an agent is not thereby the agent of the original principal, so is neither the agent or trustee of a trustee thereby the trustee of the original cestui que trust. This was evidently the view of Lord Cairns in *Ferguson* v. *Wilson*. (1) In that case, which must presently be again cited for another point, a bill was preferred against directors personally for the specific performance of a resolution of the board to allot shares, and if all available shares were allotted, for indemnity by the directors out of their own shares. Turner, L.J., and Cairns, L.J. held, first, that the undertaking was, as between the plaintiff and the company, a contract only and not a trust. "This," said Turner, L.J., "is a contract. This Court can only deal with a contract by way of specific performance, and as all the shares are already allotted, that cannot be decreed. This is not a case of trust; this is simply a case of contract. This Court cannot give damages. Therefore, &c." But Cairns, L.J., dealt more fully with the position of directors. "It ought," he said, "very clearly to be understood upon what principle and to what extent directors, in cases of this kind" (i.e. where they are sued personally), "are liable to the jurisdiction of this Court. This is a bill filed upon a contract. With whom has the contract been made? The bill alleges that the contract is made with and binds the company. *What is the position of directors of a public company? They are merely agents of a company.* The company itself cannot act in its own person, for it has no person; it can only act through directors; and the case is, as regards those directors, merely the ordinary case of principal and agent." (This means obviously as between the company and the directors.) "Whenever," he says, "an agent is liable" (i.e. to third persons), "those directors would be liable; where the liability would attach to the principal and

(1) Law Rep. 2 Ch. 77.

the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought into this court or into any other court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent, but the principal would be the person liable." This seems to me to shew that Lord Cairns, dealing with the procedure of a Court of Equity, was of opinion that the same want of direct intercourse which prevents any remedy at common law by the dealer with a company against the directors personally of such company, on the mere ground of their being directors, equally prevents any remedy against them by the same party in respect of the same relation in a Court of Equity. I think he intended to point out, that whether the remedy sought in that case was specific performance or indemnity against a breach of trust, the suit could not, in either case, be maintained against directors, merely on allegation and proof that they were directors of a company between which and the plaintiff the direct relation, whatever it was, existed.

The judgment decided that a breach of contract is not a breach of trust to be remedied by equity; that the particular undertaking in that case by the company was a contract and not a trust; that directors of a company are not, as such, trustees any more than they are agents of those who deal with the company. Directors of a company are the agents, and in some respects trustees, of the company and its shareholders, not of strangers dealing with the company by way of contract or otherwise. And yet the statement of claim in the present case vouches against the directors a liability, which would have attached against them at the suit of the plaintiff if they had been his trustees. It seems to have been founded on the following statement of the liability of a trustee to his cestui que trust: "A trustee is bound to perform all acts which are necessary for the proper execution of his trust. But by the English rule, as he is not allowed compensation for his services, he would stand in the position of a gratuitous bailee, and be responsible only for losses or improper execution of his trust in cases of gross negligence:" Story on Contracts, s. 297

1880

WILSON v. LORD BURY.

Brett, L.J.

(4th ed.). It may be perhaps noticed that in this passage, if the analogy be correct, gross negligence is the neglect of taking the same care, which a person of ordinary prudence and skill would take of his own similar affairs. I am of opinion that the defendants were not from the mere fact of their being directors trustees of the plaintiff at all. But it was then urged that the company were trustees of the plaintiff of the 1000*l.*; that they were guilty of a breach of trust with regard to it; that the defendants aided the company or acted for them in committing the breach of trust; and that the defendants were therefore liable. That the company was trustee of the plaintiff for any mortgage handed to him whilst such mortgage was in force, is not in dispute; that is asserted by the express terms of the documents. I would not decide this case upon points of pleading, though I feel bound to notice that no such case as this is even alluded to in pleading. This contention raises two questions, first, whether the company was in this case trustee for the plaintiff of the 1000*l.* in the sense of the proposition of equity law suggested; and, secondly, if yes, was there evidence which could make the defendants liable? As to the first, the question is whether there was a trust as distinguished from a mere contract. In order to determine this question it is necessary to extract from a mass of inconsistent phraseology, in almost senseless documents, what were the reciprocal rights and liabilities of the company and its clients. One really can give no business explanation of these papers, unless by supposing that they were invented and heaped up one upon another by some astute speculator for the purpose of equally puzzling shareholders, directors, and customers, and so keeping the management of a proposed company in his own hands. It is useless to attempt to construe accurately language when used with such a design. It is not intended to be intelligible. We must gather the liabilities and rights, almost regardless of the language, out of the documents, and eliminate the resulting legal relation of the parties. The obligation of the plaintiff, in my opinion, was if he should place a sum of 1000*l.* in the hands of the company to leave it there for five years. The obligations of the company were to pay interest on the whole sum placed in their hands at the rate of 6 per cent. from the receipt of the money until the end of five

years, to repay out of their own funds the 1000*l.* at the end of the five years, if it should not be otherwise realized for the plaintiff; to place in the hands of the plaintiff, as soon as possible after the receipt of the 1000*l.*, a colonial mortgage to secure 1000*l.*, but which mortgage was not to be effected in the plaintiff's name; and in case such mortgage security should by any means become ineffective before the end of the five years, to replace it by another. It was argued, and there are terms in some of the documents to justify, though not to maintain as valid, an argument, that the company undertook to pay to the plaintiff the principal sum, secured by the mortgage handed to him two months after it should become due in the colony. But that event might happen during the currency of the five years (as it did in this case), and yet the money was to remain invested with the company for five years. The result must be that such principal was, if it should become payable within the five years, not to be paid into the hands of the plaintiff, but be treated by the company as if then placed in their hands by the plaintiff for the same purpose, and under the same conditions, as was the sum of 1000*l.* when it was first paid. In other words, the company must in such case replace the security by another. All these liabilities of the company, namely, to pay interest, to replace securities, to repay principal, were binding on them, whether the colonial mortgagors did or did not fulfil their liabilities. The company was not bound to obey any instructions of the plaintiff as to the amount, duration, or sufficiency of any mortgage they might enter into, or as to what particular mortgage they might select to hand to the plaintiff. They were bound to give him a reasonable mortgage security, which they guaranteed. A stipulation that the plaintiff should give power and authority to the company to sue the mortgagors was much relied on, but seems in truth a futile stipulation. The company was to lend money to the mortgagor, and was to take a mortgage from him to itself; it is obvious that, as to him, the company was a principal, and could sue him without any authority from the plaintiff. No power was given to the plaintiff to settle with or release the mortgagor. There was no stipulation that the money lent to the mortgagor, or that the amount of the mortgage security handed to the plaintiff should be the same

1880

WILSON v. LORD BURY.

Brett, L.J.

amount as the 1000*l.* placed by the plaintiff in the hands of the company. In this case the mortgage debt was 1500*l.*, of which a part only, namely, 1000*l.*, was transferred to the plaintiff. The rate of interest of the mortgage debt was entirely according to the will of the company to be settled between them and the mortgagor without reference to the plaintiff. The whole liability of the company, therefore, was, as above stated, to pay interest, to repay principal, to hand a security not necessarily purchased with that principal, to replace that security, if necessary, and to repay the principal, if necessary. There is no express promise, and it seems to me to be contrary to the stipulated mode of carrying out the transaction to imply a promise, to keep the plaintiff's 1000*l.* apart from other funds of the company. The question is, whether such liabilities of the company, undertaken by them, by agreement, for a consideration, constitute in contemplation of law, a contract or a trust. "A contract is a deliberate engagement between competent parties upon a legal consideration, to do or to abstain from doing some act:" Story on Contracts, s. 1.

There can be no doubt, in my opinion, that the stipulations in the present case are within such a definition, and that there was a binding contract between the plaintiff and the company, with a complete remedy according to the common law for every breach of it. It would have been necessary to apply to equity to decree a specific performance of it, but for a breach of it the common law gave a complete remedy. Do such stipulations in a binding contract constitute a trust? "A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof:" Story's Eq. Jurisprudence, s. 964. I fail to see any such distinction between a legal and equitable interest in the 1000*l.* The 1000*l.* belonged by the agreement either to the plaintiff or to the company: not in law to the company with an equitable interest in it to the plaintiff. If it was by the agreement to be kept apart ear-marked for the plaintiff, it belonged at law to him. If it was not to be kept apart, it belonged to the company. "A trustee is a person holding the legal title to property under an express or implied agreement to apply it, and the income arising from it, to the use

1880

WILSON v. LORD BURY.

Brett, L.J.

and for the benefit of another person, who is called the cestui que trust. Trusts are, therefore, equitable interests in property based on confidence, over which Courts of Equity alone have full jurisdiction:" Story on Contracts, s. 296 (4th ed.). "A trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this Court:" Lord Hardwicke, in *Sturt* v. *Mellish*. (1) If I am right in saying that the arrangement to be collected from the documents, which passed between the plaintiff and the company, would give the plaintiff a complete remedy at common law for any breach by the company, then the arrangement is not a trust within these definitions. And upon this question *Ferguson* v. *Wilson* (2), before cited, seems much in point. In that case directors had bound the company to allot shares to the plaintiff. "This," said Turner, L.J. (3), "is contract. This is not a case of trust; this is simply a case of contract." In the present case the directors bound the company to pay interest, to supply a security, to replace an exhausted security, to repay the principal. These are all acts which the company are bound at law to do. This is contract, and not trust. It is like the relation of banker and customer, which is contract, and not trust.

But suppose there were a trust as between the plaintiff and the company, and that the company were trustees of the plaintiff; the subject-matter of the trust would be the 1000*l.*; the trust would be to invest and re-invest it. Then the suggestion is that the company committed a breach of trust in not re-investing it when Catherine Dill's mortgage was paid off, and that the two defendants aided the company to commit such breach of trust, and are therefore liable. This suggestion assumes that the defendants were not trustees of the plaintiff by reason merely of their being directors. They are, for the purpose of this argument, unless made otherwise by their acts, strangers to the trust. The doctrine applicable to the suggestion is laid down by Lord Selborne, L.C., in *Barnes* v. *Addy*. (4) In that case two solicitors were employed by one of two trustees, the one solicitor to draw an appointment of one trustee, and the other to draw an indemnity. Both solicitors advised against

(1) 2 Atk. 612.
(2) Law Rep. 2 Ch. 77.
(3) Law Rep. 2 Ch. 77, at p. 88.
(4) Law Rep. 9 Ch. 244.

1880

WILSON v. LORD BURY.

Brett, L.J.

the safety of the transaction, but both acted according to their instructions. It was held that the trustee was guilty of a breach of trust, but that neither solicitor was liable. "In this case," said Lord Selborne, L.C. (1), "we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves *trustees de son tort, or actually participating in any fraudulent* conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made *constructive trustees* merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a court of equity may disapprove, *unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees* . . . . In this case there is not the slightest trace whatever of knowledge or suspicion of an improper or dishonest design in the transaction. There was nothing to lead them" (the solicitors) "to suppose that Mr. B., when he had been appointed sole trustee, &c., intended to sell out the funds and put the money into his own pocket." "The general rule of the Court is, that an agent employed by a trustee is answerable only to the trustee who employed him, and that he cannot be considered a constructive trustee and be held liable as such, merely because he knew of the trusts. Such an agent is not bound to see to the application of the trust fund received by him and paid over to the trustee, at least unless he is aware that the trustee is about to misapply the same fraudulently:" *Archer* v. *Lavender*. (2) In the present case any charge of dishonesty was repeatedly repudiated. There is no pretence for saying that either defendant had any dishonest intention or any knowledge of any dishonest dealing with the plaintiff's rights. The charge of negligence negatives a charge of fraud.

The question must, therefore, be reduced to this, namely, whether the defendants are sufficiently shewn to have received and become

(1) Law Rep. 9 Ch. 244, at pp. 251, 252. (2) Ir. Rep. 9 Eq. 220, at p. 225.

chargeable with some part of the trust property. That they ever had the post-bill sent from Natal in their personal possession or control for their own personal benefit, is not pretended. They never directly received any part of the proceeds of it. It is argued that the balance-sheet shews that they received part of it in the shape of fees. But that balance-sheet does not in truth shew that these directors were ever in fact paid their fees; and if it did, it does not shew that the proceeds of the bank post-bill formed part of the fees paid to them. They were, if paid, paid out of the general fund of the company. There is nothing to shew that the fund in hand immediately after the payment into it of the proceeds of the bank post-bill was not wholly expended for other purposes before any fees were paid to the defendants. No evidence was given of any particular amount of fees paid to the defendants, and yet if they were to be made constructive trustees by reason of their having *without fraud* received trust-money, they would only be such trustees of so much of the trust-money as came to their hands. "The defendants are liable," said Bacon, V.C., in *Lee* v. *Sankey* (1), "to make good so much of the trust funds, which came to their hands, as have not been applied according to the trusts, &c." There is no evidence, therefore, that the defendants ever received for their own benefit any part of the proceeds of the mortgage. There is no real evidence that either defendant in fact knew that Catherine Dill's mortgage had been paid off, and that the proceeds had been sent to England and were paid into the general fund. Any clerk in the office paid his wages out of this money might be made liable, if these defendants can. In truth, this mode of attempting to fix the defendants is an after-thought. No such ground of liability was suggested in the pleadings or at the trial. The case relied on evidently was that the defendants were, as directors, trustees of the plaintiff, and as such trustees had been guilty of negligence. In the cases cited on behalf of the plaintiff, in which agents of trustees were held to have made themselves constructive trustees of the principal, the trust property had been applied by the agents for their own benefit with knowledge of the trust. In *Bodenham* v. *Hoskyns* (2) money was transferred by bankers from a trust account to the private account

(1) 15 Eq. 204, at p. 213. (2) 2 D. M. & G. 903.

1880

WILSON v. LORD BURY.

Brett, L.J.

of the trustee in order to increase his deposit with the bank. So in *Myler* v. *Fitzpatrick* (1) the bill alleged that the trustee had abandoned the execution of the trust to F., a solicitor, and that F. had possessed the trust moneys and employed them for his own use. Upon demurrer by F., the Vice-Chancellor said: "A mere agent is to account to his principal only; bu taccording to the allegations of this bill F. cannot be considered as a mere agent he is a delegated trustee employing the trust moneys for his private profit." If it be suggested that directors are a different kind of agent from other agents, that is to attempt again to introduce the exploded doctrine that directors are under other liabilities to dealers with the company of which they are directors than any other servants of the company would be under.

It seems to me that all the suggested grounds of liability fail, that the evidence proposed was immaterial and properly rejected, that the judgment was correct, and must be affirmed.

BAGGALLAY, L.J. As the other members of the Court agree in opinion that the judgment of the Queen's Bench Division should be affirmed, I cannot but entertain considerable doubt as to the correctness of the conclusion at which I have myself arrived. It is, however, right that I should state my views upon the subject, and I will do so as concisely as possible.

Amongst other objects for which the company was established, were first, the investment of money entrusted to it as agent for other persons; and, secondly, the guaranteeing the repayment of any money which might be invested on securities through its agency. In carrying out these objects it appears to have been the practice of the company to combine the two; and in lieu of simply investing the money entrusted to them upon mortgage or other securities, charging a commission for so doing, they guaranteed the repayment of the moneys so entrusted to them for a consideration, which, it must be presumed, covered not only the risk incurred by them in respect of the guarantee, but a remuneration for the trouble and expense incurred by them in respect of the whole transaction. It is unnecessary for me to refer in detail to the

(1) 6 Madd. 360.

several documents executed by the company and the plaintiff for the purpose of carrying out the transaction which has given rise to the present action, nor to the mode in which the company, through its directors, dealt with the money entrusted to it by the plaintiff, as they are fully stated in the judgment of Brett, L.J., which I have had an opportunity of reading and considering: it is sufficient for me to say that, in my opinion, the relation of trustee and cestui que trust was established between the company and the plaintiff; nor can I regard the mode in which the money was dealt with by the company, after Dill's mortgage had been paid off, and the omission to make any communication on the subject to the plaintiff, otherwise than as a breach of trust. It appears to me also that both the defendants were parties to and aided in the commission of that breach of trust. I fully recognise as a general rule that an agent employed by a trustee is accountable to his principal only, and cannot be made responsible as a constructive trustee to the cestui que trust, but I think that a distinction may and ought to be drawn between the case of a company necessarily acting by its directors, and an individual trustee, acting through an agent over whose actions he can exercise a control. Whether, however, I am right or wrong in thinking that such a distinction should be drawn, there can be no question that the general rule, to which I have referred, does not apply when the agent has derived a personal benefit from the breach of trust, and, in my opinion, an important question in the present case is whether the defendants have derived any such personal benefit. Upon this question, the evidence which was excluded upon the trial may have an important bearing. The two defendants held between them nearly one quarter of the whole capital of the company, and it is alleged that the excluded evidence would shew that, at the time when the proceeds of Dill's mortgage came under the control of the directors, they must have been aware of the insolvency of the company, that they nevertheless mixed the moneys of the plaintiff and of other depositors with their own, and that they from time to time retained or paid to themselves large sums by way of dividends on their shares and also as fees for their services as directors, and that they must have been aware that the moneys so retained and paid were derived, not from any funds properly

1880

WILSON v. LORD BURY.

Baggallay, L.J.

belonging to the company, but from the moneys entrusted to them by the depositors.

In my opinion the tendered evidence, which would probably shew whether these allegations were or were not well founded, ought to be admitted, and the rule for a new trial should be made absolute.

It may be that, having regard to the frame of the pleadings, it was proper to reject such evidence at the trial, but, even if this were so, the case is one in which I think liberty should be given to amend.

BRAMWELL, L.J. My Brother Brett has favoured me with the perusal of his judgment in this case. I entirely agree that the ruling of the Lord Chief Justice at the trial was right, and right for the reasons given. There is no, what may be called, common law cause of action in this case. Treating the case as one of contract, the contract was between the plaintiff and the company, and not the directors. Treated as a case of tort, no wrong in the defendants independent of duty is shewn, and no breach of any duty to the plaintiff is shewn in the defendants for the same reason that no contract is shewn to have existed between them. The case is not mended by the statement of claim saying that the negligence was "gross." That will not give a cause of action, unless negligence not gross will, and that will not, unless mere nonfeasance will, and that will not in this case unless it is a breach of contract in the defendants, and that it is not, for there is none with the plaintiff.

I also agree that the evidence was properly rejected as irrelevant to the question in the cause.

But a case was made before us which was not made at the trial, nor, as I think, open on the pleadings. And, for my own part, if I thought that case a good one, I would not allow a new trial unless upon payment of the costs of the former trial and subsequent proceedings. But I think it is not a good case. It is that there was a relation of trustee and cestui que trust between the plaintiffs and the company and a breach of trust, and that the defendants were parties to aiding in bringing about that breach of trust, and consequently are liable for it to the plaintiff, the cestui que trust.

1880

WILSON v. LORD BURY.

Bramwell, L.J.

I approach the consideration of this question with great distrust from want of familiarity with it, and from the singularly confused character of the documents between the plaintiff and the company, the description of which by my Brother Brett I also agree in. I feel it difficult to say there is not a trust. The money is received to invest. If the security is paid off, it is to be reinvested. I do not think that there being a contract and an agency prevents there being a trust, nor that the company were to pay interest from the time they received the money; nor from what seems to me a consequence of that, namely, that they might properly make some use of the money without mixing it with their general funds, till they could find a proper investment according to their agreement. Still there are those things, and the considerations to which they give rise, and I strongly feel the danger of implying trusts with all their complexities from a business contract. It is not necessary to decide this. For assuming that there is a trust and a breach of it, I can see no reason on which the directors can be held personally responsible for it to the plaintiff. On this matter also I entirely agree with the reasoning and authorities of my Brother Brett, to which I can add nothing profitably. I also am of opinion that this judgment should be affirmed.

Rule discharged.

Solicitors for plaintiff: *Hewitt & Alexander.*
Solicitors for defendant, Lord Bury: *White, Borrett, & Co.*
Solicitors for defendant, Montgomerie: *Linklaters & Co.*

1880
April 13.

[IN THE COURT OF APPEAL.]

LETCHFORD *v.* OLDHAM.

Insurance (Marine)—Policy—Warranty against Average—"Stranding," what amounts to.

A policy of marine insurance on cargo contained the usual warranty against average unless the ship were stranded. The place of discharge was in a tidal harbour, where vessels of the size of the ship in question can only get to the quay to unload during high spring tides. A ship arriving in the port is brought towards the quay as soon as in the pilot's judgment there will be water enough to float her there, and, if in the course of getting her to the quay the depth of water proves insufficient, she takes the ground to wait until the next tide admits of her being floated further. The ship in question was in the course of being brought to the quay, but it was found that she could not get within twenty feet of it, and consequently she was left where she was to await a higher tide. As the tide receded and she settled down, instead of resting on an even keel she pitched by the head into a hole, and remained in such a position as to cause her timbers to be strained, by reason whereof she made water and damage resulted to the cargo. It afterwards appeared that there was an elevation in the bottom of the harbour, a small bank having been formed parallel with the quay, and a hole beside it into which the vessel had pitched. This state of things had been caused by the paddles of steamers leaving the harbour at low tide, and its existence had not been found out previously to the accident:—

Held, that the taking of the ground by the vessel was under circumstances of such an accidental and unforeseen character as not to be in the ordinary course of navigation and to amount to a "stranding."

ACTION upon a policy of marine insurance. The trial took place before Field, J., without a jury, when the case was reserved for further consideration. The facts and the arguments before Field, J., sufficiently appear from the judgment.

Butt, Q.C., and *J. C. Mathew*, for the plaintiff.
Watkin Williams, Q.C., and *Bremner*, for the defendant.

Cur. adv. vult.

1879. July 21. FIELD, J. This is an action brought by assured against underwriter to recover his proportion of an average loss upon a cargo of maize shipped on board the *White Eagle*, and which the plaintiff claimed under a policy of assurance containing the usual warranty of freedom from average "unless

the ship is stranded." It was tried before me without a jury. There was no doubt but, and in fact it was admitted, that the plaintiff had sustained an average loss in respect of the cargo from a peril insured against, and there was very little doubt but that the loss had been the direct consequence of the injuries sustained by what was said to be a "stranding," but it was also truly said on the part of the defendant, and not denied, that the loss could not create a "stranding" unless the circumstances, taken by themselves, amounted to it, and for the purpose therefore of determining whether the *White Eagle* was or was not stranded I entirely disregard the injury in fact to the cargo and the loss thereby sustained. Upon the evidence it appeared that the risk covered by the policy was on goods until safely landed at Dingle, a port in a tidal harbour on the west coast of Ireland, in which, for a vessel of the draught of the *White Eagle*, there is only sufficient water to enable the vessel to reach the quay there at the highest, or within a few tides of the highest, springs, and that on the reflux of the tide she would be left only partially waterborne, so that she would of necessity have to take the ground twice in every twenty-four hours. It further appeared that in the ordinary course of navigation and management of a ship of her size, if she did not happen to arrive off the harbour at the time when the springs were on, she would have to bring up in Dingle Bay and wait until, in the judgment of the pilot, there would be sufficient water in the harbour to float her either to the quay or towards the quay so far as the tide would float her, and then, if she took the ground short of the quay for want of water, she would have to wait until the next tide or tides to make further way when there should be water enough to float her to the place where she has to discharge. The harbour being exposed to the winds from the Atlantic, the depth of water at the springs varies considerably, and it is a matter of judgment of the pilot when to move. The bed of the harbour at the part where the pier and quay are situate shelves gradually upwards to the bank. There is nothing in the nature of the bottom, which was hard sand, to cause danger to a ship taking the ground at the ebb tide. This, therefore, being the ordinary course of navigation and management of which both parties must be considered to have knowledge, it is obvious that

1880

LETCHFORD v. OLDHAM.

Field, J.

neither of them contemplated that a taking of the ground in this manner would be a stranding within the meaning of the memorandum, for as that must of necessity occur in the course of the contemplated voyage, upon such a construction of the policy the underwriter would in any event be liable to an average loss and lose the protection of the warranty. Indeed, this was not denied by the assured, but his contention was that the circumstances and manner, under and in which the *White Eagle* actually took the ground, and which I am about to describe, were not such risks as the parties contemplated as probably occurring in the ordinary course of navigation and management, but were of an accidental and fortuitous character, and therefore that the taking of the ground which the plaintiff relied on constituted a stranding within the meaning of the policy, and entitled him to recover for his loss, although it was not total. Upon this head it appeared that the *White Eagle* arrived in Dingle Roads on the 21st of July, and as the next highest spring tide was not until the 30th she brought up there and waited for water. On the 26th there was water enough to float her further in, and in the expectation that she would be able to get to the quay on that tide she proceeded towards it under sail, but took the ground for want of water within 300 yards of the quay. On this occasion she took the ground on an even bottom, and on sounding the pumps had no more than her usual quantity of water. She lay at this spot until the next day, when she was hauled 100 yards further, when the wind having shifted she could get no further, and again took the ground on an even keel, and without damage. It was not contended that on either of these occasions anything more had happened than was to be expected in the ordinary course of navigation. On the 28th she again floated, and it was what happened on this occasion that was said to amount to a stranding. She expected to reach the quay, but took the ground and remained fast twenty feet from the quay, the quay lying on her starboard bow, and the people left her, imagining that she had taken the ground in the ordinary manner. As, however, the tide receded and she settled down, instead of resting on an even keel she pitched by the head with a heavy list to starboard towards the pier, and remained fast in that position. At the ebb she had one and a half feet of water at her

stern and three feet at her stem, and it appeared that there was a hole at her bow and another at her stern. The tide left her in the night, and at daylight it was found that there was an elevation in the channel, which was described as a small bank, which was very nearly parallel with the quay, and that she had pitched by the head into the hole which apparently had been caused by the formation of the bank, and she was about two feet more by the head than by the stern. At the time she first took the ground the pumps were sounded, and no water was found in her, but when she righted the next day she was found to have two feet of water in her, in consequence of having been strained as she lay in the position described. She was then lightened, and proceeded to her berth at the quay, and in the course of proceeding and lying there she did not appear to sustain any injury. From the appearance of the bank and hole it seemed as if they had been caused by steamers that had been lying at the berth, and had formed them by the revolutions of their paddles on going out at low tide, and it was in substance agreed that such must have been the cause of them, and that their existence was not known of beforehand, and that no vessel had met with a similar occurrence before.

At the close of the evidence it was agreed that, as there was no dispute as to the facts, the jury should be discharged, power being reserved to me and to the Court to draw all necessary inferences of fact; and the case having been subsequently argued before me on further consideration, I now give my judgment in favour of the plaintiff. The inference which I draw is that, having regard to the place and manner in which the vessel took the ground as above detailed, such taking of the ground was not in the ordinary course of navigation and management so as to have been in the contemplation of the parties as likely to happen, but was due to the unforeseen accidental circumstance of the casual formation of the bank and hole which forced the vessel into an unusual and damaging position, resulting in the injury before-mentioned.

Had the bed of the river been in its usual state and condition there is no reason to suppose but that at that state of the tide, she would have taken the ground upon an even keel resting on her bilges in safety as she had done twice before; instead of which, the accident of the existence of the bank unknown

1880

LETCHFORD v. OLDHAM.

Field, J.

to the pilot prevented her reaching the berth which she otherwise would have safely arrived at, and the hole caused her to pitch forward with the list which no doubt hogged her; a mode of taking the ground which I regard as accidental and fortuitous and therefore not such as the parties contemplated. This being the result of my judgment on the facts, is there any authority to compel me to come to the contrary conclusion? I find none. I accept as accurate the definition of "stranding" given by Lord Tenterden in *Wells* v. *Hopwood* (1), and by Lord Chief Justice Tindal in *Kingsford* v. *Marshall* (2), and these definitions were in truth so far admitted by the learned counsel for the underwriter at the bar, but he said that this case did not fall within the meaning of the word "stranding," as there defined, inasmuch as the parties in charge of the *While Eagle* had a definite intention that she should take the ground in her course to the pier; and although they might not have had in their minds the precise spot at which she was stopped, they were willing to go in as far as they could, and were willing that she should take the ground on any part of the bed or bank on which the depth of water should be insufficient to float her, and that the mere circumstance that the spot on which she touched was dangerous, and that injury and loss was in consequence sustained, could not convert an ordinary operation of navigation into a "stranding." But it is clear that the mere intention to take the ground is not enough to prevent a "stranding," if there are other circumstances which shew either that the doing so did not occur in the course of the contemplated voyage, or occurred at a spot or in a manner out of the ordinary course of navigation or management on such a voyage.

Thus in *Corcoran* v. *Gurney* (3) the master of a vessel bound from Nantes to Dublin, in stress of weather ran for a tidal harbour at ebb tide, when he knew that the ship must take the ground, but there was held to be a stranding, for she had entered the harbour otherwise than in the ordinary course of navigation on that voyage. In *De Mattos* v. *Saunders* (4) a vessel lay on a bank in Penarth Roads, a place where vessels usually lay at anchor, but she went there for security, having lost her anchor and being towed there

(1) 3 B. & Ad. 20.
(2) 8 Bing. 458.
(3) 1 E. & B. 456.
(4) Law Rep. 7 C. P. 570.

for salvage in distress, and there was held to be a stranding. In *Wells* v. *Hopwood* (1) the ship was moored at a spot where it was intended she should take the ground, but, through the stretching of the rope ahead, and her being moved by the wind blowing from the east, she settled on a heap of rubbish instead of in the natural bed of the river, and the majority of the Court held it to be a stranding. Again, in *Bishop* v. *Pentland* (2), the vessel was in a harbour dry at every tide, and moored to the spot where ships of her burden usually lay and where she was intended to be placed, but she fell over and was stove in in consequence of the accidental breaking of an insufficient rope; and this was held to be a stranding by accident, for she ceased to be in the position in which ships usually were in that port in the ordinary course of navigation.

The cases upon which the counsel for the underwriter chiefly relied in support of his contention were the cases of *Hearne* v. *Edmunds* (3), *Kingsford* v. *Marshall* (4), and *Magnus* v. *Buttemer* (5), but, upon examination, they are, I think, plainly distinguishable. In *Hearne* v. *Edmunds* (3) the ship took the ground in the ordinary manner in going up Cork Harbour, the bottom of which was proved on the trial to be hard and stony (see note to *Kingsford* v. *Marshall* (4)); and this case may almost properly be ranged with *Magnus* v. *Buttemer* (5) and *Fletcher* v. *Inglis* (6), in which the real question was not whether there was a stranding or not, but whether there was a loss by perils of the sea or not, and so is no authority on the present occasion. The case of *Kingsford* v. *Marshall* (4) is the most in favour of the defendant which his counsel was able to cite. In that case the ship took the ground in a tidal harbour at the spot it was intended it should, but upon a hard substance; and it was contended that she had done so in consequence of the accidental breaking of a rope, and that she had therefore been stranded. The judge left the question to the jury, whether the taking of the ground took place, as was contended, merely in consequence of the ebbing of the tide in the ordinary course of navigation, or whether in consequence of the breaking of the rope the ship took the ground not in the place

(1) 3 B. & Ad. 20.
(2) 7 B. & C. 219.
(3) 1 B. & B. 338.
(4) 8 Bing. 458.
(5) 11 C. B. 876.
(6) 2 B. & A. 315.

1880

LETCHFORD v. OLDHAM.

Field, J.

where it was intended she should settle with the ebbing of the tide but in some other place, in which case there would be a stranding. The jury negatived the accident, and all that the Court said was that the direction was right.

It seems to me that that decision is quite consistent with the conclusion to which I have come, viz., that the *White Eagle* in the present case was stranded; and so that the plaintiff is entitled to recover a sum, the amount of which is to be ascertained elsewhere.

Judgment for the plaintiff.

The defendant appealed.

1880. April 13. *Herschell, Q.C.* (*Bremner*, with him), for the defendant. The question is whether there has been a stranding within the meaning of the policy. If a vessel takes the ground from either high wind, or the breaking of a rope, it is a case of stranding; but if she takes the ground in the ordinary course of navigation, as for instance, where she is expected not to float owing to the shallowness of the water, there is no stranding, even although the spot turns out to be dangerous. In the present case there was no stranding, for no casualty of navigation happened, but the nature of the harbour to which she was bound did not permit her to be afloat. The authorities are collected in 2 Arnould on Marine Insurance, part 3, ch. 3, p. 797 (5th ed.). Where a vessel grounds in the ordinary course of the voyage, there is no stranding: *Hearne* v. *Edmunds*. (1) It was decided in *Wells* v. *Hopwood* (2) that if a vessel takes the ground whilst merely navigating a harbour where the depth of water is from time to time deficient owing to natural causes, it is not a case of stranding; but that a different rule is to be applied where the accident happens from the breaking of a rope or other cause of a like nature. *Kingsford* v. *Marshall* (3) and *Magnus* v. *Buttemer* (4) are to the like effect.

[BRETT, L.J. It would appear from 2 Phillips on Insurance, c. 18, s. 1758 (5th ed.), that the question whether there is a stranding, depends upon the circumstance whether the vessel has taken the ground under extraordinary circumstances.]

(1) 1 B. & B. 388.
(2) 3 B. & Ad. 20.
(3) 8 Bing. 458.
(4) 11 C. B. 876.

1880

LETCHFORD v. OLDHAM.

J. C. Mathew (*Butt, Q.C.*, with him), for the plaintiff. The accident, which befell the plaintiff's vessel, did not occur in the ordinary course of navigation, and hence there was a stranding within the meaning of the policy: *Bishop* v. *Pentland.* (1) The essence of stranding is an accident unforeseen or not contemplated at the time when the contract of insurance was entered into. Here the existence of the bank was unknown at the time when the policy was effected.

Herschell, Q.C., in reply. On each occasion when the vessel floated, the master endeavoured to reach the quay, but he was prevented from attaining his object by the natural shallowness of the water.

[COTTON, L.J. Was there not evidence that the bank was fortuitous, and had been recently raised?]

It was for the plaintiff to prove that it was fortuitous; and it is not to be assumed against the defendant that the bank was of recent origin.

BRETT, L.J. I think that the judgment of Field, J., was right, and ought to be affirmed. I will not try to give an accurate or exhaustive definition of "stranding." I accept as correct the definitions given by Lord Tenterden, C.J., in *Wells* v. *Hopwood* (2), and by Tindal, C.J., in *Kingsford* v. *Marshall.* (3) In some cases I think it unnecessary to use the exact words which Tindal, C.J., employed. He used the following language: "Now it is perfectly clear, and has been settled by various decided cases, that by the term 'stranding' neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say, that when a vessel, in the course of a voyage insured, is sailing in a tide river, or puts into a tide harbour, the taking the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding, within the meaning of the policy. . . . We think a stranding cannot be better defined than it has often been in several decided cases, namely, where the taking of the ground

(1) 7 B. & C. 219. (2) 3 B. & Ad. 20, at p. 34.
(3) 8 Bing. 458, at pp. 463, 464.

1880

LETCHFORD v. OLDHAM.

Brett, L.J.

does not happen solely from those natural causes, which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause." In applying this doctrine to the facts before us, we may paraphrase it by saying that a vessel is stranded where the taking of the ground does not happen from usual causes ordinarily incident but from unusual causes. It has been argued that there cannot be a stranding while the vessel is in the ordinary course of navigation, and the counsel for the defendant in effect contended that there can be no stranding whilst the vessel is in the ordinary track: I cannot assent to that, for it would follow that whilst she was in the ordinary track for the voyage, no taking the ground could be deemed a stranding, although it might happen from causes of a most unusual kind. It is sufficient to say that where by temporary circumstances the bottom of the harbour is in a different condition from its ordinary state, and a vessel takes the ground in a different manner from that which was intended, she may be said to be stranded. If this be true, the only question is whether the bottom of the harbour was in a different condition from its usual state. If it were true that steamers had habitually altered the ground by using their paddles, the shifting condition of the harbour would have been its ordinary condition; similarly, if the harbour had been altered by the tide or by a running stream which occasionally brought down much water, the changeable condition would be the ordinary condition; but upon the facts of the present case the judge was justified in finding that some steamers using the harbour had taken the unusual course of forcing their way out of the harbour, and had thus temporarily altered the bottom. Certainly the vessel took the ground in a different way from what was anticipated, and the accident was caused by a temporary alteration of the harbour. It was an unusual event, and I think that the vessel was stranded within the meaning of the policy.

COTTON, L.J. I am of the same opinion. It was contended that the bank was an incident of the ordinary condition of the harbour; but it appeared that such a state of circumstances had

1880

LETCHFORD v. OLDHAM.

Cotton, L.J.

never been known before; it was an unusual circumstance, and the vessel grounded from an extraneous cause. The definition of Tindal, C.J., in *Kingsford* v. *Marshall* (1) applies. The harbour was not in its ordinary condition; the shallowness was not caused by the tide, but by an accidental and extraneous circumstance; it was an unknown and unforeseen raising of the bottom which caused the small depth of water. I think that this was a stranding within the meaning of the policy.

THESIGER, L.J. If upon the evidence in this case it had appeared that the trench and bank, where the grounding took place, had been due to the ordinary shiftings of the bed of the harbour, arising either from natural causes or from artificial causes constantly and more or less regularly acting, the case would not in my opinion have been one of stranding; but the inference drawn, and I think properly drawn, by Field, J., from the facts proved was that the trench and bank were due to an accidental as well as artificial cause temporarily and recently arising, and that the bed of the harbour was not in its usual or ordinary state and condition.

Under such circumstances and upon the principles laid down by Tindal, C.J., and other judges, it appears to me that the judgment for the plaintiff was right.

Judgment affirmed.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendant: *Ashurst, Morris, Crisp, & Co.*

(1) 8 Bing. 458, at pp. 493, 494.

1880
May 4.

TOMBS, APPELLANT; MAGRATH, RESPONDENT.

Volunteer Act, 1863 (26 & 27 *Vict. c.* 65), *s.* 21, *sub-ss.* 1, 2—*Dismissal of Member—Administrative Battalion—Commanding Officer.*

Under the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21, sub-ss. 1, 2, the ordinary commanding officer of a volunteer corps, which forms part of an administrative battalion, is authorized to dismiss a member from the corps for breach of discipline, although the corps is at the time assembled in camp with the rest of the administrative battalion under the general command of the battalion commander.

CASE stated by justices for Royal Leamington Spa, under 20 & 21 Vict. c. 43.

1. An information having been preferred by the respondent against the appellant, under s. 27 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65) (1), charging that he, the appellant, on the

(1) By the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21: With respect to the discipline of officers (other than officers of the volunteer permanent staff) and volunteers, the following provisions shall take effect and be in force while they are not on actual military service:—

(1.) The commanding officer of a volunteer corps may discharge from the corps any volunteer, and strike him out of the muster-roll, either for disobedience of orders by him while doing any military duty with his corps, or for neglect of duty or misconduct as a member of the corps, or for other sufficient cause, the existence and sufficiency of such causes respectively to be judged of by the commanding officer.

(2.) If any volunteer, while under arms or on march or duty with the corps or administrative regiment to which he belongs, or any portion thereof, or while engaged in any military exercise or drill with such corps or regiment . . . . disobeys any lawful order of any officer under whose command he then is, or is guilty of misconduct, the officer then in command of the corps or regiment, or any superior officer under whose command the corps or regiment then is, may order the offender . . . . into custody, but so that the offender be not kept in such arrest or custody longer than during the time of the corps or regiment then remaining under arms, or on march or duty, or assembled, or continuing engaged in any such military exercise or drill as aforesaid.

By paragraph 63 of the Regulations for the Volunteer Force, 1878: Whenever it is practicable, corps of volunteers which are not of sufficient strength to constitute by themselves a regiment, brigade, or battalion are united with others of the same arm to form an administrative regiment, brigade, or battalion, herein called an administrative regiment.

By paragraph 64: The object of this administrative organisation is to unite separate corps under a common head to secure uniformity of drill among them, and to afford them the advantage of the instruction and assistance of an adjutant, but it is not intended to

1st of July, 1879, at Royal Leamington Spa, did unlawfully fail (demand having been duly made upon him) to make payment of a certain subscription then due and owing from him (as a late non-efficient member) to the funds of the 10th Warwickshire Rifle Volunteer Corps, amounting to the sum of 1*l.* 5*s.*, the justices made an order for the payment of the said sum of 1*l.* 5*s.*, with costs.

2. On the hearing of the information it was proved that the appellant, for some time previous to the 14th of June, 1879, when the administrative battalion went into camp, as hereinafter mentioned, and on the 19th of June, 1879, was a member of the 10th Warwickshire Rifle Volunteer Corps, which consisted of two companies, of which the respondent was captain commandant and commanding officer, and whose headquarters were at Leamington; that the two companies, on the 19th of June, 1879, were assembled in camp in Stoneleigh Park, Warwickshire, the two companies, together with the other companies forming the first administrative battalion of the Warwickshire Rifle Volunteers, the whole of the companies in camp being under the command of Lieutenant-Colonel Machen, the commanding officer of the administrative battalion. That on parade of the 10th Warwickshire Rifle Volunteer corps, forming a part of the administrative battalion in camp on the 19th of June, 1879, the respondent being present superintending the company drill of the 10th Warwickshire Rifle Volunteer

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interfere with their constitution or financial arrangements, with the operation of their respective rules, or with the powers specially conferred on their commanding officer by Act of Parliament, or to require them to meet together for united drill in ordinary times, except with their own consent.

By paragraph 73: Subject to the powers conferred by the law upon the commanding officer of each corps, the officer commanding an administrative regiment will have the general charge of the drill and instruction of the several corps under his command. He will inspect them from time to time and will take notice of, and, if necessary, report any infraction of the provisions of the law or of the orders and regulations of the Secretary of State. He will also be responsible that uniformity in drill is preserved throughout the force under his command. When present at the drill or parade of any of the corps, he will invariably be in command.

By paragraph 74: No officer of a corps forming part of an administrative regiment has any authority over the other corps of which it is composed in consequence of their administrative union; but whenever the several corps, or any number of them, meet together for drill, the senior officer present assumes the command.

1880

TOMBS v. MAGRATH.

corps, for some breach of discipline at drill the appellant was afterwards dismissed from the corps by the respondent, and that there was due from the appellant, if properly dismissed by the respondent, the sum of 25*s.* as subscription to the corps for the year 1879.

3. At the close of the hearing of the case in support of the information counsel for the appellant submitted that the same must be dismissed, inasmuch as he contended that the respondent was not at the time the appellant was so dismissed from the corps the commanding officer of the same, within the meaning of s. 21 of the Volunteer Act, 1863, and the Volunteer Regulations, 1868, but that the corps being joined with other corps in camp as aforesaid, Lieutenant-Colonel Machen was such commanding officer whilst in camp, and he referred to the Volunteer Regulations, 1878, p. 16, rules 73 and 74, in support of his contention.

4. The justices being of a contrary opinion, gave their determination against the appellant and made the order as before stated.

5. The question for the opinion of the Court is whether the respondent was the commanding officer of the corps on the occasion when he dismissed the appellant from it, within the meaning of s. 21 of the Volunteer Act, 1863, and the Volunteer Regulations, 1878.

Underhill, Q.C. (*Stubbins*, with him), for the appellant. The commanding officer of the administrative battalion, and not the respondent, was the person having power to dismiss a volunteer for breach of discipline. Under the Regulations for the Volunteer Force, 1878, the commander of the administrative battalion is held responsible for the due maintenance of order in the corps, and is entitled to determine what drill is to take place.

Bigham, for the respondent, was not heard.

LUSH, J. I am of opinion that the order of the justices was right. The appellant was proceeded against for the non-payment of a subscription due to him as a member of the 10th Warwickshire Rifle Volunteer Corps, and the only question connected with his liability to this subscription is whether he was properly dismissed from the corps by the respondent. It appears that this corps consisted of two companies; that the respondent was

captain and commanding officer, and that the headquarters were at Leamington. In June, 1879, the two companies forming the corps were assembled together with other companies in camp, forming one administrative battalion, which was under the command of Lieutenant-Colonel Machen, commanding officer of the administrative battalion. During a parade of the corps forming part of the administrative battalion, the respondent being present and superintending the company drill of the corps, the appellant for some breach of discipline was dismissed from the corps by the respondent, and the objection has been taken that, inasmuch as the corps was combined with other companies into an administrative battalion under the command of Lieutenant-Colonel Machen, this officer was the only person authorized to dismiss the appellant. Upon reference to s. 21 I think it quite clear that the only person who had the power of dismissal was the ordinary commanding officer of the corps. By s. 21, the commanding officer of a volunteer corps may discharge from the corps any volunteer, either for disobedience of orders by him while doing any military duty with his corps or for neglect of duty or misconduct, or for other sufficient cause, to be judged of by the commanding officer. The commanding officer of an administrative battalion has only the power of ordering a volunteer to be arrested during the period while the battalion is collected under his control.

We have been referred to the Regulations for the Volunteer Force, 1878, but these regulations were not intended to interfere with the powers given by the Act to the ordinary commanding officer, and they shew that the authority of the commanding officer of the administrative regiment does not continue after the parade is over, and that he is responsible only for the good conduct of the members during drill.

FIELD, J. I am of the same opinion. It is admitted that if the appellant was properly discharged from the corps the order of the justices was properly made. It appears that the appellant was a member of a volunteer corps, and as s. 21 gives the commanding officer of such a corps the power of discharging any volunteer for breach of discipline, and the respondent was un-

1880

TOMBS v. MAGRATH.

doubtedly the commanding officer of the corps, he was the right person to order the appellant to be dismissed unless some exceptional circumstances affecting this power are shewn. It has been argued that as the corps formed part of an administrative battalion the commanding officer of this battalion had the exclusive power of dismissal. If the argument is correct this officer might punish for a breach of duty at company drill where he was not present. Are we obliged to adopt this view? I think not. The regulations were not intended to interfere with the usual powers of the ordinary commanding officer of the corps. It was intended to make the officer in charge of the administrative battalion the commanding officer for the purposes of parade and drill, and to leave the power of dismissing members in the regular commanding officer of the corps.

Judgment for the respondent.

Solicitors for appellant: *Field, Roscoe, & Co., agents for Beddington, Warwick.*

Solicitors for respondent: *Burton & Co., agents for Overell & Co., Leamington.*

May 4.

HORDER, APPELLANT; SCOTT, RESPONDENT.

Adulteration—Sale of Food and Drugs Act (38 & 39 *Vict. c.* 63), *ss.* 13, 20—*Purchase of Sample for Analysis—Procedure—Officer acting by Deputy.*

Under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), which by s. 13 enables an inspector of nuisances or any one of other specified officers to procure a sample of food or drugs, and if he suspect it to be sold to him contrary to the Act to submit it for analysis to the district analyst, and by s. 20 enables the person causing the analysis to be made to take proceedings for the recovery of the penalty imposed for such offence, it is not necessary that the officer taking such proceedings should have acted personally in the purchase of the sample, and the person purchasing the sample on his behalf need not himself deliver the sample to the analyst, but may hand it to another for the purpose of such delivery.

CASE stated by justices for Stafford under 20 & 21 Vict. c. 43.

The respondent, Agnes Scott, was charged by summons upon an information laid by J. G. Horder, of Streethay, Lichfield, Stafford, one of the Inspectors of Weights and Measures for the county and also the inspector duly nominated and appointed under

the Sale of Food and Drugs Act, 1875 (1) for South Staffordshire, for that she "did unlawfully sell to the prejudice of one Samuel Toy, the purchaser, a certain article of food, to wit, coffee, which was not of the nature nor substance and quality of the article demanded by such purchaser contrary to the statute."

At the hearing of the information it was proved by S. Toy that he was assistant to the appellant, inspector under the Food and Drugs Act, and that on behalf of Horder he went to the respondent's shop and purchased two ounces of coffee from her. She asked him if he wanted the best. He said Yes, and she charged him 2½*d.* for the two ounces. He then told her it was to be analysed by the county analyst, and divided the sample into

(1) By the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 12, any purchaser of an article of food or of a drug in any place being a district, &c., where there is any analyst appointed under this or any Act hereby repealed shall be entitled on payment to such analyst of a sum not exceeding 10*s.* 6*d.* to have such article analysed by such analyst and to receive from him a certificate of the result of his analysis.

By s. 13 any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable, under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts, and such analyst shall, upon receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer wherein he shall specify the result of the analysis.

By s. 14: the person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated and each part to be marked and sealed, or fastened up in such a manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison, and shall submit the third part, if he deems it right, to have the article analysed, to the analyst.

By s. 17: if any officer, inspector, or constable, as above described, shall apply to purchase any article of food or any drug exposed for sale or on sale by retail on any premises or in any shop or stores, and shall tender the price for the quantity which he shall require for the purpose of analysis, not being more than shall be reasonably requisite, and the person exposing the same for sale shall refuse to sell the same to such officer, inspector, &c., such person shall be liable to a penalty not exceeding 10*l.*

1880

HORDER v. SCOTT.

three parts and left one part sealed and labelled and numbered. The appellant was not present when the purchase was made, but Toy delivered the sample to him in the same state as when he received it the same day about four o'clock at Wolverhampton. The respondent told Toy before he left the shop that what he had bought was a mixture of coffee and chicory.

The appellant proved the receipt of the two sealed packets and that he delivered one to Mr. Jones, the county analyst, in the same state that he received it from Toy. The analyst certified that the sample contained forty-one per cent. of chicory.

The justices held that as the proceedings were initiated by the appellant in his official capacity as such inspector, and he having laid the information in the case, and having regard to ss. 13, 14, and 17 of the Food and Drugs Act, 1875, he (and not Toy) should have personally purchased the article, and should also have dealt with it pursuant to the requirements of s. 14 of the Act.

2. That as Toy was the purchaser, and so described in the summons, he and not the appellant should, pursuant to the requirements of s. 14 of the Act, have submitted the article purchased to the county analyst and should have laid the information against the respondent.

3. That the mode in which the article purchased was dealt with by Toy was not in accordance with either ss. 12 or 14 of the Act. They accordingly dismissed the summons.

The question was whether their determination was correct.

Jelf, for the appellant, having referred to 38 & 39 Vict. c. 63, ss. 12, 13, 14, was stopped.

No counsel appeared for the respondent.

LUSH, J. I think that the decision of the magistrates was wrong, and that the case must go down for decision on the merits. The information charges the respondent with unlawfully selling to the prejudice of one Samuel Toy, the purchaser, coffee which was not of the nature, substance, and quality of that demanded by the purchaser, which is the offence described in 38 & 39 Vict. c. 63, s. 6. This information is laid by the appellant, who is an

inspector appointed under the Act, and Toy was his agent, and did not buy the coffee for his own use, but for the purpose of analysis, and the recent case of *Hoyle* v. *Hitchman* (1) has established that a sale is "to the prejudice of the purchaser," within the section, although it is bought officially for the purposes of analysis. Toy therefore may be regarded as an ordinary purchaser, but when it appeared that he had been sent by the inspector who took the proceedings, the magistrates thought that he and not Toy ought to have personally purchased the article, and to have dealt with it pursuant to s. 14 of the Act. I think they were wrong. I cannot think that it matters whether the person taking the proceedings purchased the article with his own hand or not. Then the magistrates appear to have held that as Toy was the purchaser, and was so described in the summons, he and not the appellant ought to have submitted the article to the analyst, and to have laid the information. And here again, I think they were wrong. The procedure under s. 14 for submitting the article for analysis is only a mode of ascertaining the genuineness of the article, and does not form part of the substance of the offence. Sect. 12 of the Act enables any purchaser of an article of food to have it analysed by the district analyst, while s. 13 authorizes inspectors of nuisances and other specified officers to procure samples and to have them analysed by the analyst at the cost of the local authority. The inspector is not authorized to do anything which an ordinary purchaser might not do, the only difference is that he does it as representing the local authority, and at their expense. Finally, the justices say that the mode in which the article purchased was dealt with by Toy was not in accordance with ss. 12 and 14. Now, s. 14 enacts that the purchaser shall forthwith notify to the seller his intention to have the article analysed, and shall deal with the sample in the manner prescribed. This is what Toy did, and the fact that he delivered the sample to the inspector who submitted it to the analyst, is of no possible consequence.

As to the statement in the case that the respondent mentioned before Toy left the shop that what she had sold was a mixture of chicory and coffee, s. 8 clearly shews that this would afford no

(1) 4 Q. B. D. 233.

1880

HORDER v. SCOTT.

defence, no printed or written label to the effect that the article was mixed having been supplied to the customer.

FIELD, J. I am of the same opinion. It would have led to great inconvenience if we had been forced to come to a different conclusion. Officers, such as the inspectors of nuisances, or inspectors of weights and measures, have numerous duties to perform, and if we held that to procure a sample under s. 13, the inspector must personally visit the shop, we should limit the operation of a very beneficial Act.

Case remitted.

Solicitors for appellant: *T. White & Sons, for Hand, Blackiston, & Co., Stafford.*

May 12.

[IN THE COURT OF APPEAL.]

JONES *v.* THE MONTE VIDEO GAS COMPANY.

Practice—Production of Documents—Affidavit of Documents—Application for further Affidavit—Rules of the Supreme Court, 1875, *Order XXXI., rule* 12.

An affidavit of documents made pursuant to Rules of the Supreme Court, 1875, Order XXXI., rule 12, is conclusive against the party seeking discovery, unless it can be shewn either from the affidavit itself, or from the documents therein referred to, or from an admission in the pleading of the party swearing the affidavit, that other documents exist in his possession or power which are material and relevant to the action. In any of these instances, but not otherwise, a further affidavit may be ordered.

THIS was an action for wrongful dismissal. The defence alleged by way of justification that the plaintiff had been guilty of disobedience and had failed to keep proper accounts. The plaintiff obtained an order under Rules of the Supreme Court, 1875, Order XXXI., rule 12 (1), for an affidavit of documents. The defendants, by one of their officers, set out upon affidavit the documents in their possession. The plaintiff made an affidavit specifying certain documents, which he alleged had been omitted

(1) By Rules of the Supreme Court, 1875, Order XXXI., rule 12: "Any party may, without filing any affidavit, apply to a judge for an order directing any other party to the action to make discovery on oath of the documents, which are or have been in his possession or power, relating to any matter in question in the action."

from the defendants' affidavit. The defendants' secretary made an affidavit stating that the documents were not material or relevant to the action. A master made an order for a further affidavit by the defendants. Upon appeal Field, J., adjourned the hearing in order that the plaintiff might shew by affidavit how the documents mentioned in his affidavit were material. At the adjournment Pollock, B., affirmed the master's order. The Queen's Bench Division confirmed the decision of Pollock, B.

The defendants appealed.

April 21. *Shiress Will*, and *Farwell*, for the defendants. A party seeking discovery cannot be allowed to contradict an affidavit of documents made pursuant to Rules of the Supreme Court, 1875, Order XXXI., rule 12: *Gardner* v. *Irvin* (1); *Welsh Steam Coal Collieries* v. *Gaskell* (2); Morgan's Chancery Acts and Orders 522 (5th ed.).

Archibald, was called upon to argue for the plaintiff. It will be a hardship upon a party to a suit, if he is to be concluded by an affidavit, and is not to be at liberty to shew that some documents are wilfully withheld. The affidavit of the secretary of the defendant company admits the documents to be in their possession, and according to the practice of the Common Law Courts an affidavit of surcharge would be allowed to shew the materiality of those documents.

Cur. adv. vult.

May 12. The following judgments were delivered:—

BRETT, L.J. In this case the question turns upon Order XXXI., rule 12, and calls upon us to decide as to its true construction. An order was obtained that the defendants should make discovery of documents; the plaintiff was not satisfied with the affidavit of the defendants' officer, and alleged that certain documents had not been set out. He made a contentious affidavit to that effect. The defendants' officer alleged that these documents were not relevant, and notwithstanding this objection upon behalf of the defendants an order has been made for further discovery. The proper practice as to the discovery of documents no longer depends upon the orders of the Court of Chancery, or

(1) 4 Ex. D. 49, at p. 53. (2) 36 L. T. (N.S.) 352.

1880

JONES v. MONTE VIDEO GAS CO.

the Common Law Procedure Acts, or the custom or practice of the Common Law Courts. It depends upon the orders and rules of the Judicature Acts. These were drawn up by the judges and adopted by Parliament. The Judicature Acts confer the power of framing rules. When the rules were drawn up, no doubt some reference was made to previously existing practice and procedure; but it was intended that they should apply to every Division of the High Court, and the extended principles of the Court of Chancery were followed rather than the narrower practice of the Courts of Common Law, which, however, was itself derived from the practice in equity. When this case was argued before us, we had no doubt as to the result, and as to what principle ought to be applied; but we desired to make the rule of practice as elastic as possible, and we wanted to find out what other practice had been followed. We have consulted all the other members of the Court of Appeal who usually sit and act, and we are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient. This was the practice observed in the Court of Chancery, and the orders and the rules under the Judicature Acts were made in imitation of it. It may be urged that a party seeking production may be injured by the wrongful withholding of a document, and that an affidavit in contradiction ought to be admitted under supervision. But this mode of proceeding cannot be allowed: the affidavit of documents must be accepted as conclusive. Another remedy, however, may be used by the party seeking production. He can administer interrogatories; and interrogatories properly framed may force a person to disclose what documents he has in his possession, and the party requiring the

production will thereby avoid committing any breach of the practice as to affidavits of documents. I think that this appeal ought to be allowed.

COTTON, L.J. I think that the decision of the Queen's Bench Division must be reversed. The question before us turns upon Order XXXI., rule 12, which, I think, is founded upon the former practice of the Court of Chancery. When an affidavit of discovery was sought, it could not be contradicted, and must have been taken to be sufficient, unless from the documents referred to, or from an admission in the pleadings of the party from whom discovery was sought, or from the affidavit itself, it could be gathered that some documents were withheld. The object of this practice was to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient. I think that a similar practice ought to be followed now, and my view is supported by the opinion of the other judges of the Court of Appeal. I wish, however, to remark that if the party seeking production is dissatisfied with the affidavit of documents, he may administer interrogatories, and thus obtain further information.

THESIGER, L.J. I agree with the views of the other members of the Court. I confess that I felt somewhat apprehensive about drawing a hard and fast rule as to the practice as to affidavits of documents; for unless the party seeking production can surmise from his adversary's admissions that some documents are being withheld, he must rest content with the statements in the affidavit of discovery. But the costs of interlocutory proceedings ought to be kept down, and I think that the rule suggested by the other members of the Court is proper to be adopted. There is sufficient protection against an improper withholding of information by the power in the party to administer interrogatories, and in the judge to deal with the costs. A judge ought to be severe in awarding costs when he finds that expenses have been incurred through a wrongful suppression of material documents.

Appeal allowed.

Solicitor for plaintiff: *T. H. Devonshire.*
Solicitor for defendants: *G. M. Clements.*

1880
May 12.

[IN THE COURT OF APPEAL.]

DARRELL *v.* TIBBITTS.

Insurance (Fire)—Contract of Indemnity—Payment by Insurer—Right of Insurer to Benefit of Contract entered into by Assured—Landlord and Tenant.

A policy of fire-insurance is a contract of indemnity, and upon payment of the amount of loss the insurer is entitled to be put into the place of the assured; and if at a subsequent time the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him.

North British and Mercantile Insurance Co. v. *London, Liverpool, and Globe Insurance Co.* (5 Ch. D. 569), commented upon and followed.

THE facts of this case may be shortly stated as follows:—

One Forbes was the owner of a house in Brighton; he demised it to certain persons named Bonner by a lease, which rendered the lessees bound to repair, "except casualties by fire, demolition by storm or tempest of the building or any part thereof, or destruction by foreign enemies." Forbes insured the house in the Union Society (of which the plaintiff was secretary) by a policy against fire covering injury by explosions of gas. In 1877 the corporation of Brighton repaired the streets by a steam roller, which owing to its weight damaged a pipe and caused an escape of gas into the house demised to Bonner, where it exploded and did considerable damage. Forbes sold the house and the policy to the defendant, and after some negotiation the Union Society paid to the defendant a sum of 750*l.* The lessees received compensation from the corporation of Brighton for the damage done to the house by the explosion, and with the sum received reinstated the house. At the time when the Union Society paid to the defendant the sum of 750*l.* they were unaware that by the terms of the lease the lessees were bound to make good injuries done by an explosion of gas. The Union Society, upon hearing that the house had been reinstated by Bonner, claimed from the defendant the sum of 750*l.*, and upon his refusal brought the present action in the name of the plaintiff. Lush, J., gave judgment for the defendant.

The plaintiff appealed.

May 11. *Benjamin, Q.C.*, and *Cohen, Q.C.* (*Wood-Hill*, with them), for the plaintiff.

R. T. Reid, for the defendant.

The arguments are sufficiently noticed in the judgments. The following cases were cited: *Mason* v. *Sainsbury* (1); *Godsall* v. *Boldero* (2); *Dalby* v. *India and London Life Assurance Co.* (3); *Yates* v. *Whyte* (4); *Dickenson* v. *Jardine* (5); *Cousins* v. *Nantes* (6); *Simpson* v. *Thomson.* (7)

Cur. adv. vult.

May 12. The following judgments were delivered :—

BRETT, L.J. We have to give judgment in a case which has been heard before Lush, J., but which was not argued before him upon the point that we are to decide, and in which the authorities cited to us, and binding upon us, were not mentioned to him. He thought that the case must come before the Court of Appeal, and consequently he gave no considered judgment: therefore we are practically not overruling his judgment, but we are dealing with the case as upon an original hearing, although no doubt this is technically an appeal.

At the commencement of the argument I understood the question for our determination to be, on the one hand, whether fire-policies were contracts of indemnity like marine policies, or, on the other, whether they were contracts to pay a certain sum of money in a particular event like life-policies. But I think that this question has been settled by a decision of the Court of Appeal, whose judgment we are bound to follow; and the real point in this case turns out to be whether the plaintiff can maintain the action.

It seems to me, according to the principle of *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (8), that if the tenants had not repaired the damage, and had declined to do so, the insurance company would have been bound to pay the landlord who had insured with them, but would

(1) 3 Doug. 61.
(2) 9 East, 72.
(3) 15 C. B. 365.
(4) 4 Bing. (N.C.) 272.
(5) Law Rep. 3 C. P. 639.
(6) 3 Taunt. 513.
(7) 3 App. Cas. 279.
(8) 5 Ch. D. 569.

1880

DARRELL v. TIBBITTS.

Brett, L.J.

have had a right to bring in his name an action against the tenants, and recover from the tenants what they had paid to the landlord; in other words, a policy of fire insurance is a contract of indemnity similar to that which is contained in a policy of marine insurance. That case seems to me further to shew that if the landlord had sued the tenants before he received payment from the insurance company, he must have recovered from them, for it would have been no answer by the tenants that the landlord was insured. That case seems to me also to decide this, that if the landlord had recovered damages from the tenants equivalent to the injury done to him by the refusal of the tenants to repair, he could not afterwards sue the insurance company. The landlord was paid by the insurance company at a time when they could not resist his demand, as they were bound by their contract to pay. Afterwards the corporation of Brighton, by whose negligence the mischief happened, paid the amount of damage to the defendant's house, and this amount was expended in making good the damage. I think, however, that the case stands in the same position as if the tenants had executed the repairs with their own moneys.

The question now arises whether the insurance company who paid the money to the landlord at a time when they were obliged to pay by virtue of their contract, can recover it back because the tenants have done that which they could not avoid doing: if they had not repaired, they must have paid damages to the landlord. If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with: the landlord would be not merely indemnified, he would be paid twice over. A technical difficulty arises in my mind as to the ground upon which the landlord can be held liable in this action, but it is a difficulty which ought to be surmounted. I do not think that the money can be recovered back upon the ground that the consideration for the payment of the money has wholly failed: because the premium upon the policy is part of the consideration, and no one supposes that the premium is to be returned. But it seems to me that according to all rules of law we have a right to imply a

11 QBD 391

promise on the part of the landlord to the insurance company at the time of payment by them, that if the loss should be afterwards made good by the tenants, he would repay the money which he received from the insurance company. I think that the landlord is liable on another ground also. The doctrine is well established that where some thing is insured against loss either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against. So that immediately after the insurance company had paid the landlord, they were put into his place with regard to the contract to rebuild, which was a contract respecting the subject-matter insured, that is, the building, and which contract was affected by the safety, or the loss of that building by reason of the explosion, which was a peril insured against, and therefore they are to be subrogated or to be put into the place of the landlord with regard to his rights; they might have sued in his name the tenants if the latter had not repaired, and when the tenants have repaired, the insurance company are to have the benefit of those repairs.

Judgment must be entered for the plaintiff.

COTTON, L.J. The first question is whether a fire policy is a contract of indemnity. That was decided in the *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1) It is also established that the insurer of a person, who has a remedy against some one else to compel him ultimately to make good the loss, stands in the position of a surety. What are the rights of a surety? When a surety pays a debt, he has the right to be put in the place of the creditor as against the principal debtor, and to use all the remedies which the creditor could have used as against the principal debtor, in order that the surety may recover back the sum which he has paid, and which the creditor has a right to demand from him. In

(1) 5 Ch. D. 569.

1880

DARRELL v. TIBBITTS.

Cotton, L.J.

the present case the owner of the house undoubtedly had a right to recover under the policy from the insurance company. But they paid as sureties only for a loss which was ultimately to be borne by some one else, and if at the time they had thought fit to do so, they might have called upon the landlord to give to them the right to sue the tenants. This, however, they did not do. It has been argued that although the company might have a right to use the name of the landlord against the wrongdoer who caused the loss, that is, against the corporation; yet there could be no such right to require the landlord to let the company have the benefit of any contract entered into by him, under which he has been in effect paid. I do not think that this argument can find any support upon principle, but it is in truth disposed of by the case which I have mentioned, where the rights of the parties depended upon contract. In principle there can be no difference between a right which the assured has as against a wrongdoer, and a right which he has under a contract entered into by him. What he has insured, is his loss having regard to the contract which is entered into by other persons: the insurance is to indemnify him against the loss, and although the company is bound to pay when the loss occurs, yet the circumstance does not change the position of the parties. If the landlord had sued the tenants, the company would have had a right to say, that although they had not required him to sue, yet as the money had come into his hands, he was under an obligation to recoup them wholly or partly what they had paid him: here the money has not been received by the landlord from the wrongdoer, that is, the corporation, but the tenants having recovered from it and having repaired the house, the money paid by the company represents a sum in the hands of the landlord exceeding the loss sustained by him. Under these circumstances no doubt there is some difficulty in saying what is the ground upon which the money is to be obtained from the landlord. I do not think that technically the company have a right to recover back the money which they have paid, but they have a right to the benefit of what the assured has received in respect of a contract referring to the loss, by which he was entitled to receive compensation in damages, and which they might have called upon him to enforce for their benefit: when he has received that benefit, they

can treat him as being under an obligation to use it as they may direct. A difficulty no doubt arises from the circumstance, that the money having been expended in the repair of the house cannot be deemed to be held in trust for the company. But I think that under the circumstances before us an obligation arises upon an implied contract, that the assured shall hold for the benefit of the company, or pay to them, the amount that he subsequently receives under any contract relating to the loss, which they would have been entitled to require him to put in force for their benefit at the time when they as insurers paid to him the amount of his loss. If the company had known of the covenants in the lease, and of the actual position of the parties, it might have been said that they had paid without requiring the covenant to be enforced and therefore had lost their remedy. If this state of facts had arisen, it is unnecessary to determine what would have been the result. Here it is admitted that at the time when the money was paid, the obligation of the tenants under their covenant was not known. There was some mistake as to what the covenants were, and what the liability of the landlord was as to his insurers. Therefore it is impossible to say that the company gave up any right.

THESIGER, L.J. I am of opinion that the company is entitled to recover the amount which they paid to the defendant.

The objections to their claim are two; the first substantial, the second formal.

The substantial objection raises the question, whether in a case like the present, a person whose loss is covered by a policy of insurance, is entitled to keep the moneys payable under that policy, and is at the same time entitled to have under a legal obligation the damage repaired with other moneys than those paid under the policy. It appears to me that that question is really covered by the authority of the case which has been cited, namely, the *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1) In that case goods had been bailed with an absolute obligation on the part of the bailees, to protect them from fire, and as a consequence to pay to the

(1) 5 Ch. D. 569.

1880

DARRELL v. TIBBITTS.

Thesiger, L.J.

bailors the value of those goods in the event of their being destroyed by fire. The bailors, notwithstanding that they had this liability on the part of the bailees, thought fit to further secure and protect themselves by an insurance made in their own names and for their own benefit. A fire having occurred, the question was raised, whether the insurance company that had insured for the bailees, was entitled to have contribution for the damage from the insurance office that had insured for the bailors. Then it was held that the contracts of insurance were entirely independent, and that there was no right of contribution, and further, that the bailors and their insurers were to be looked upon as one person, and the bailees and their insurers were to be looked upon as another, and that the rights of the parties were to be regarded in the following light, namely, that as the bailors themselves would have a right directly against the bailees in respect of the goods consumed by the fire, and therefore indirectly against their insurers, so the bailors' insurers would be in the same position; and if before what is called the primary liability had been fulfilled through the payment by the bailees or their insurers, the bailors' insurers had paid the amount of the insurance, they would have had a claim to be subrogated to the rights of their assured, and to claim against the bailees and their insurers; and if before the bailors' insurers had paid the money secured by the policy, the bailees or their insurers had fulfilled their primary obligation, and had paid the value of the goods destroyed, the bailors would have had no claim upon their insurers. That seems to be identical with the position of the parties in this case. Instead of the bailment of goods, there is what may be called the bailment of a house, that is, a lease has been granted with an obligation on the part of the lessees to repair damage done to the house by explosion of gas; the lessor therefore had the primary liability of the lessees to repair the house, but he also insured against damage from explosion by gas, the policy protecting him in the event of the lessees not fulfilling their contract. What difference is there between this case and the *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.*? (1) If the lessees themselves had insured against an explosion by gas, the two cases would have

(1) 5 Ch. D. 569.

been identical: and it can make no difference that the liability to repair rests solely upon the tenants, and that they have no remedy against any insurers, although in the present case they had a remedy which they exercised against the corporation, by whose wrongful act the damage was really caused. It was argued on behalf of the defendant that as regards the rights of insurers, a distinction exists between a case where the assured has a remedy against a tortfeasor in respect of the damage covered by the policy, and a case where the assured has a right by contract with some third person, to be indemnified in respect of that same loss. I am by no means prepared to say that there may not be some contracts so entirely independent of the subject-matter of the insurance, as to put the assured in the position of being more than indemnified in the event of a loss. But I am clearly of opinion as a matter of principle, that where the contract of insurance and the contract with the third party cover identically the same subject-matter, the assured has no right to more than an indemnity. Moreover on this point the case which I have mentioned is conclusive.

The argument as to the second or formal objection was put somewhat in this fashion. It was urged that even although the assured had not a right both to keep the money paid by way of insurance, and to have the house repaired by the tenants, yet there are no means by which the money paid by the company can be recovered back. I cannot feel any difficulty as to this matter. It appears that the money was paid by the company through the pressure of the assured upon what must be taken to be a representation, that he had at all events at that time no other indemnity against the loss which had been sustained; and also it is clear that the money was paid at a time when the company was absolutely bound to do so. It being clear that the assured is not entitled to a double indemnity, it would be the duty of this Court so to mould or adapt the forms of procedure, that justice should be done, and that the equities between the parties should be properly adjusted. But it is unnecessary to go as far as that, because it appears to me that upon well-established principles, and by well recognised forms of action, the plaintiff who represents the insurance company is entitled to recover the

1880

DARRELL v. TIBBITTS.

Thesiger, L.J.

money claimed in this action. It appears to me that this suit may be supported upon one of two grounds: it may be maintained either as an action at common law for money had and received, to recover the sum which they paid upon the ground that that money was paid upon the conditions, that the person to whom it was paid had sustained a loss, that in point of fact no loss had been sustained, and therefore that the money paid by the company ought in justice to be returned to them. It is also maintainable as a kind of suit in equity founded upon the following grounds; the assured having been indemnified against the loss sustained by him through the payment by the insurance company, the latter have a right to be subrogated into the place of the assured; one of those rights was either to compel the tenants to repair the house demised to them, or to pay damages equivalent to the cost of the repair; and as the assured has received from other sources compensation for his loss, he ought to put the company in the same position which they would have held, if the house had been repaired before they were called upon to pay the amount of the damage.

In my opinion the appeal must be allowed.

Judgment reversed, and entered for the plaintiff for 750*l.*

Solicitors for plaintiff: *Dawes & Sons.*

Solicitors for defendant: *Langley & Gibbon.*

Applied. CHELL ENGINEERING, LTD. *v.* UNIT TOOL AND ENGINEERING CO., LTD. [1950] 1 All E.R. 378.

STOOKE *v.* TAYLOR. 1880 *Aug.* 7.

Practice—Costs—Action for more than 50*l.—Counter-claim—Reference—Costs "to abide event"—Judgment for Plaintiff on Balance for* 15*l.—Judicature Act,* 1873, *s.* 67—*County Courts Act,* 1867, *s.* 5.

An action was brought claiming first, 10*l.* for rent; secondly, 100*l.* as damages for breach of covenant in a lease of premises; and, thirdly, 30*l.* for conversion of the plaintiff's goods. The defendant pleaded, admitting that the rent was due, but denying the breach of covenant and conversion, and setting up a counter-claim for 100*l.* damages for breach of covenant by the plaintiff, and 15*l.* for money due for the use and occupation of other premises. The action was referred to an arbitrator by an order made by consent upon the terms that "the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator." The arbitrator found that the plaintiff was entitled to 10*l.* for rent; that the defendant had broken his covenant in the lease, and had been guilty of the conversion charged, and he awarded that the plaintiff was entitled to recover in respect of such breach of covenant and conversion the sum of 25*l.*, making together 35*l.* awarded to the plaintiff: that the plaintiff had broken his covenant, and that the defendant was entitled to recover in respect of that breach 20*l.*; and upon the whole matter he found that the plaintiff was entitled to recover in the action 15*l.* and no more:—

Held, by the majority of the Court (Cockburn, C.J., and Manisty, J.), Field, J., dissenting, that the provision in the order of reference as to costs did not alter the rights of the parties, and that upon the true construction of s. 67 of the Judicature Act, 1873, the plaintiff was entitled to the costs on his claim, and the defendant to his costs on the counter-claim.

Staples v. *Young* (2 Ex. D. 324) questioned.

By Field, J., that the case was governed by the provision as to costs in the order of reference, and that the plaintiff was entitled to the costs of the action, and that the defendant was not entitled to any.

Chatfield v. *Sedgwick* (4 C. P. D. 459) discussed.

APPEAL from an order of Stephen, J., allowing the plaintiff his costs.

The facts and the nature of the arguments are fully stated in the judgments of Cockburn, C.J., and Field, J.

1880. May 8. *Bucknill,* for the plaintiff.

Bompas, Q.C., and *P. H. Smith,* for the defendant.

Cur. adv. vult.

Aug. 7. The following judgments were delivered:—

COCKBURN, C.J. This case raises a question of considerable importance with reference to the right to costs in actions brought in a superior Court, in cases in which a county court possesses a

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

concurrent jurisdiction. It comes before us on an appeal from an order of Mr. Justice Stephen, allowing the plaintiff his costs in an action brought in this Division, the facts connected with which are as follows:—

The action was brought by the plaintiff for breach of covenants in a lease, to pay rent, and keep the premises in a proper state of internal repair, as also for the conversion of the plaintiff's goods. The defendant, by way of counter-claim, claimed damages from the plaintiff for breach of a covenant in the same lease, to keep the premises in a proper state of external repair, as also for rent due in respect of the occupation by the plaintiff of a loft and store room, part of the premises demised to the defendant.

The cause coming on for trial at nisi prius, was referred to arbitration—the arbitrator to have "all the powers as to certifying and otherwise of a judge of the High Court of Justice;" the "costs of the action to abide the event of the award or certificate;" the "costs of the reference and award, or of the certificate, to be in the discretion of the arbitrator."

After hearing the parties, the arbitrator made his award, in favour of the plaintiff, for the amount of 15*l.*; directing that the defendant should pay the plaintiff's costs of the reference and should bear the costs of the award, but giving no certificate under s. 5 of the County Court Act of 1867, so as to entitle the plaintiff to the costs of the action.

Mr. Justice Stephen having made an order allowing the plaintiff the costs of the action, an application was made to this Court to set that order aside, upon which the Court directed that the case should go back to the arbitrator, to say how he arrived at the sum of 15*l.*, and to find separately on the claim and counter-claim, and also on the plaintiff's claim for the conversion of his goods. Thereupon the arbitrator found specifically that the plaintiff was entitled to recover in respect of the breach of covenant by defendant to repair, and for the conversion of his goods, to the amount of 25*l.*, and 10*l.* for rent, which was not disputed, making in all 35*l.*; while the defendant was entitled to recover 20*l.* on the counter-claim for breach by the plaintiff of the covenant to repair; leaving a balance of 15*l.* in favour of the plaintiff, in respect of which, and in all other respects, he confirmed his award.

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

On these findings of the arbitrator I am of opinion that the order of Mr. Justice Stephen, allowing the plaintiff the costs of the action should be upheld; but that the order should be varied to the extent of also allowing the defendant his costs on the counter-claim.

The question was submitted to us on the part of the defendant as depending on the combined effect of the 5th section of the County Court Act of 1867 and the 67th section of the Judicature Act of 1873. But, inasmuch as the question arises whether the latter section has here any application at all, it appears to me expedient to consider in the first instance how the matter would stand on the County Courts Acts, independently of the Judicature Act, and then to see what bearing, if any, the latter has on the question.

The first County Court Act (9 & 10 Vict. c. 95), while it gave jurisdiction to the county court in personal actions (with certain specified exceptions) in which the debt or damage claimed did not exceed 20*l.*, left the concurrent jurisdiction of the Superior Courts of Law untouched. But, in order to induce plaintiffs to resort to the county court in matters within its jurisdiction, it was provided by s. 129 that, except in certain specified cases, where in an action brought in a superior Court a verdict was found for the plaintiff for a sum less than 20*l.* in an action founded on contract, or less than 5*l.* in an action founded on tort, the plaintiff should have no costs, unless the judge who tried the cause should certify that the action was fit to be brought in the superior Court.

By 13 & 14 Vict. c. 61, the jurisdiction of the county court was enlarged to "debts, damages, and demands" not exceeding 50*l.*; but the provision as to costs remained as before, except that by s. 11 of the later Act, for the words of the 129th section of the former, "if a verdict shall be found for the plaintiff," were substituted the words, "if a plaintiff shall recover,"—words to which —whether so intended by the legislature or not may be doubtful —a specific effect has been attached—and that for the words, "a sum less than 20*l.*" of the first Act, were substituted the words, "a sum not exceeding 20*l.*"

The effect, therefore, of the later Act was to give to the county courts a concurrent jurisdiction with the Superior Courts up to

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

50*l.*, without subjecting a plaintiff who sued in the superior Court and recovered less than 50*l.*, if he recovered more than 20*l.* in contract, or 5*l.* in tort, to the penalty of losing his costs. The plaintiff had the option of suing in the county court if he thought proper to avail himself of a cheaper and speedier procedure; but he was not bound to do so unless he pleased. He still had the right to resort to the higher court—nor could the defendant decline the forum—subject, however, to the loss of his costs, if he failed to recover a sum exceeding 20*l.* in an action of contract, 5*l.* in one of tort.

In this respect the County Court Act of 1867, so far as relates to costs in actions ex contractu, has left the law exactly as it stood before; the only change in respect of costs introduced by that Act being the provision in s. 5, by which the amount which a plaintiff must recover in a superior Court in an action founded on tort, to entitle him to costs, is raised, from 5*l.*, the amount required by the former statutes, to 10*l.* The amount to be recovered in order to entitle the plaintiff to his costs in an action ex contractu remains as before.

So far, therefore, as the question depends on the County Courts Acts, if the plaintiff can be here said to have "recovered" 35*l.*—inasmuch as, though enabled to sue in the county court to recover that amount, he was not compelled to do so in order to recover his costs on a judgment for that amount—he will be entitled to his costs, unless the 67th section of the Judicature Act of 1873 has effected a change herein, a question to be considered presently.

But it is said that the plaintiff has not recovered 35*l.*; but only 15*l.*; and therefore has not satisfied the requirement of 13 & 14 and 30 & 31 Vict. In my opinion this is not so. The plaintiff, as it seems to me, recovers 35*l.* in the action which he brings, although it is true that, by the effect of the statutes, he obtains judgment only for the amount by which the sum he recovers exceeds the amount recovered by the defendant on his counter-claim. That this would have been so under the old procedure, and the County Courts Acts, independently of the Judicature Act is, I think, clear. A defendant, whether sued in a superior Court or in a county court, to make good his claim

against the plaintiff, not only for unliquidated, but also for liquidated damages, unless where there was an admitted set-off, must have brought his separate and independent action. Each party would then have recovered, and would have been entitled to judgment, in his respective action. It is only by the express enactment of 9 & 10 Vict. c. 95, s. 93, that the right to have execution on the judgment in a county court action is limited to the excess of the judgment for the larger amount over that for the smaller. The section just referred to provides that "if there shall be cross judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum, and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments."

It is obvious that as "cross judgments" must be taken as equivalent to judgments in cross actions, each party is here treated as recovering the amount for which he obtains judgment in his own action, although by an equitable provision, introduced by the statute into the procedure of the county courts, execution is only allowed for the balance of the larger judgment, after deducting the amount of the smaller. And this express enactment was necessary to enable this equitable arrangement to take place. In the prior state of the law as to the effect of a cross-action, nothing of the sort could have happened. So, although, if the defendant's claim was for liquidated damages, he might, by virtue of the statute, set off the amount against the plaintiff's claim, if his claim was for unliquidated damages, it was not open to him to do so until, under a new system of procedure, a counter-claim was allowed to take the place of a cross-action, with advantages to the defendant which were not afforded him by the older form of procedure.

Let us see, then, how the matter stands under the new system introduced by the Judicature Acts. A defendant, who, having a claim for unliquidated damages against the plaintiff suing him, must before have brought a cross-action, is now enabled to meet the plaintiff's claim by counter-claim, in other words, by a proceeding

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

which, without being in form a cross-action, is so in substance —for that is what a counter-claim in effect amounts to—and is thus enabled to have his claim tried and disposed of concurrently with that of the plaintiff, so that the latter shall gain no advantage in point of time, but justice shall at one and the same time be done between the parties. To effect this the more completely, the plaintiff, if he establishes a claim to a larger amount than the defendant is able to make good on his counter-claim, is allowed to have judgment for the difference only. But he has nevertheless credit for the residue of his claim, so far as he has established it, against the counter-claim of his adversary, and to that extent must, I think, be taken to have recovered it. If he had not recovered it in his own action, he could not have the benefit of it against what in effect is the action of his opponent.

In like manner the defendant is entitled by the statute to have the amount which he may have established on his counter-claim deducted from the amount of the plaintiff's claim. Why? Because he has recovered it in his action against the plaintiff.

It may happen, and sometimes does happen, that the plaintiff fails in making good his claim altogether, while the defendant succeeds in establishing his, and so, on his part, becomes entitled to recover, and has judgment on his counter-claim. Or the defendant establishes a claim to a larger amount than the plaintiff has been able to make good. Order XXII., rule 10, provides that in such case the Court may give judgment for the balance. In whose action does he obtain judgment? I apprehend clearly in his own, not in that of the plaintiff. In effect each party establishing his claim recovers to that amount in his own action, though the statute adjusts the balance between them, and limits the judgment and execution to it.

It was, however, pressed upon us on the discussion of the rule, with reference to the question of costs, that the claim of the plaintiff having been reduced by the counter-claim to 15*l.*, and a counter-claim being, as was contended, equivalent to, and standing on the same footing as, a plea of set-off, the plaintiff could not, according to the statutes of set-off, be said to have recovered more than 15*l.*, and therefore was not entitled to costs—a contention upheld by the decision of the Exchequer Division to that effect in

Staples v. *Young* (1), an authority which, if it is to be followed, is decisive of the question before us. But I cannot acquiesce in the view taken in *Staples* v. *Young* (1), or abide by and follow the decision in that case. In my opinion it is altogether a mistake to treat a counter-claim and set-off as standing on the same footing, or a counter-claim as equivalent only to a set-off. Set-off and counter-claim may be, and commonly are, essentially different; and it becomes necessary, therefore, to see in each case whether a counter-claim amounts in effect to no more than a set-off, or whether it is in effect a cross-action. Set-off and counter-claim are both the creation of statute, the common law not admitting of the action of a plaintiff against a defendant being met by an independent claim of the defendant against the plaintiff, but leaving the defendant to his cross-action. The effect of these two modes of proceeding must, therefore, be sought in the statutes by which they were introduced, and in their results; and when these are looked at, it will be seen how essentially these two forms of procedure differ. By the Statutes of Set-off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff, and no more. By the terms of the Act the plea must be pleaded in the action; and it is by the effect of the express enactment of the statute, that, "in case the plaintiff shall recover, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after the one debt shall have been set off against the other," that the defendant gets the benefit of the statute. While, therefore, it has been rightly held by the Court of Common Pleas in *Ashcroft* v. *Foulkes* (2), and by this Court in *Beard* v. *Perry* (3), that where a plaintiff's claim in an action in a superior Court is reduced by proof given under

(1) 2 Ex. D. 324.

(2) 18 C. B. 261.

(3) 2 B. & S. 493.

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

a plea of set-off to less than 20*l.*, he cannot be said to have "recovered" more than 20*l.*, though, apart from the set-off, he has established his claim to that extent, it by no means follows that the same principle will apply to a counter-claim.

Morally, there can be no doubt that there is an essential difference between these two cases. In a case of set-off the claim being for liquidated damages, its existence and its amount must be taken to be known to the plaintiff, who should have given credit for it in his action against the defendant. This reasoning does not apply to a counter-claim, the effect of which, as distinguished from a mere set-off, is altogether different. It is, as I have already pointed out, to all intents and purposes an action by the defendant against the plaintiff. It is not confined to debts or liquidated damages. It is not even necessary that the claim should be analogous to that of the plaintiff. A claim founded on tort may be opposed to one founded on contract, or vice versâ. But the most striking difference is that the counter-claim operates, not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff. To the extent to which the damages accruing to the defendant on the counter-claim may be in excess of those accruing to the plaintiff on his claim, the defendant becomes entitled to judgment, with this additional advantage that, having been obliged to meet the plaintiff on the forum chosen by the latter, he is not bound, as to costs, by the conditions on which the plaintiff depends for obtaining them. And there is this further essential difference between these two forms of procedure, that when the defendant's claim is for liquidated damages, in other words, one of set-off, the plaintiff in his claim can give credit for the amount, and so avoid the costs of the set-off, whereas, when the claim is for unliquidated damages, he is unable so to protect himself. Nothing, as it strikes me, can be more explicit than the language of rule 3 of Order XIX. on this head: "A defendant in an action may set off, or set up by way of counter-claim"—thus distinguishing between set-off and counter-claim as distinct forms of procedure—"against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim shall have *the same effect as a statement of*

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

The law as to the difference between set-off and counter-claim is correctly stated by Mr. Pitt-Lewis, in his very useful work on County Court Practice, p. 321. "A set-off," he says, "would seem to be of a different nature from a defence, inasmuch as a set-off appears to show a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross-claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words, a set-off appears to consist of a defence to the original claim of the plaintiff; a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts." In *Winterfield* v. *Bradnum* (1), Brett, L.J., says: "A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits, which for convenience of procedure are combined in one action. I know that a practice has arisen, that, if the counter-claim overtops the plaintiff's claim, judgment is entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties." *Myers* v. *Defries* (2) was, therefore, in my opinion rightly decided, where it was held that, where the plaintiff succeeded in his claim, and the defendant on his counter-claim, the word "event" in Order LV. was to be read distributively, and each party was entitled to his costs.

I am therefore of opinion that, while, under the special enactments of the statutes relating to set-off, a plaintiff recovers no more than the amount of his claim as reduced by the set-off, the effect of a counter-claim is altogether different, and that where such a claim is set up as a cross-action, each party recovers the

(1) 3 Q. B. D. 324, 326. (2) 5 Ex. D. 15.

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

amount of his claim, although by a wise and salutary provision, the party establishing his claim for the larger amount, whether plaintiff or defendant, obtains judgment for the excess only of his claim over that of the other.

It appears to me therefore, that the contention of the defendant, founded on the authority of *Staples* v. *Young* (1), and the reasoning in that case, that a plaintiff does not recover the amount which he establishes on his own claim, when the amount for which he can have judgment is reduced by the counter-claim, is unsound and ought not to prevail.

But it is argued that by the operation of s. 67 of the Judicature Act of 1873, which incorporates the 5th section of the County Court Act of 1867 (30 & 31 Vict.), the standard on which the right of a plaintiff to costs depends, is raised to the amount of 50*l.* In my opinion this is an entire misconception, both of the purpose and the effect of the enactment. The section is as follows: "The provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act, 1867, shall apply to all actions in the High Court of Justice, in which any relief is sought which can be given in a county court." It is contended that inasmuch as relief can be given in a county court to the extent of 50*l.*, that amount must be recovered in order to entitle the plaintiff to costs. But if such had been the purpose of this enactment, we should have in it a most remarkable instance of legislative oversight and incapacity. For, the incorporation of the 5th section of the Act of 1867, by reference, can have no greater effect than if the section had been introduced bodily into the Act. But all that the 5th section of the Act of 1867 does is to enact that unless a plaintiff recovers a sum exceeding 20*l.* in contract, or 10*l.* in tort, he shall have no costs. It does not touch the case in which a plaintiff recovers an intermediate amount. So that the result would be that the enactment would defeat itself, and the standard of costs would remain just as it stood before. But this reductio ad absurdum arises, I cannot but think, only on a mistaken reading of the 67th section. The purpose and effect of that enactment was, not to raise the amount of the relief sought, so as to deprive a plaintiff of costs in an action within the concurrent jurisdiction of the county court,

(1) 2 Ex D. 324.

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

unless he recovered 50*l.*, but had reference to the nature and character of the relief sought, and to the jurisdiction to be exercised in the particular instance. The purpose was to apply the rule as to costs, established by the County Court Acts in actions at common law, to which the jurisdiction of the county court was originally confined, to the other instances in which jurisdiction had been conferred on it by subsequent legislation, such as the equitable jurisdiction and jurisdiction in matters of probate, without provision being made as to costs, where relief was sought in a superior Court in causes thus brought within the jurisdiction of the county court. The intention and effect of the enactment was to establish a uniform rule as to costs in all cases in which a concurrent jurisdiction was exercised by the county court, and in which express provision had not been made by the statute conferring the particular jurisdiction. I am therefore of opinion that the 67th section of the Act of 1873 has not the effect of raising the amount necessary to entitle the plaintiff to costs beyond the amount fixed by the 5th section of the Act of 1867.

But it is said that although the view which I have thus expressed would have been the right one had the cause been tried out, and the verdict of the jury taken and judgment given thereupon, in the ordinary course, yet that as here the cause was referred to arbitration, and, by the terms of the order of reference, the costs of the action were to abide the event, the arbitrator having made his award in favour of the plaintiff for 15*l.*, as the balance of the two claims as established, this was the event on which the costs of the action were to depend.

This contention is directly at variance with the decision of the Exchequer Division in *Cole* v. *Frith* (1), but it is said to be upheld by that of the Court of Appeal in *Chatfield* v. *Sedgwick*. (2) But, in my opinion, the judgment in the last-mentioned case, giving the costs to the defendant, is not, when rightly considered, in conflict with my view of the law. The plaintiff in that case sued the defendant for 57*l.* 10*s.*, but on a reference to a master established his claim, to the extent only of 16*l.* 1*s.* 5*d.* The defendant on his counter-claim established a claim against the plaintiff to the amount of 23*l.*, thus making a balance in his favour of

(1) 4 Ex. D. 301. (2) 4 C. P. D. 459.

1880

STOOKE v. TAYLOR.

Cockburn, C.J.

6*l.* 18*s.* 7*d.* It was held by the Common Pleas Division, that while the plaintiff, having recovered less than 20*l.*, was disentitled to costs by s. 5 of the County Courts Act of 1867, the defendant, not coming under the operation of the County Courts Acts, was, though he recovered only 6*l.* 18*s.* 7*d.*, entitled to the costs of his counter-claim. This decision was in my opinion perfectly correct. Claim and counter-claim being for liquidated damages, to the extent to which the amount established by the defendant was co-extensive with, and so operated to extinguish the plaintiff's claim, the counter-claim operated as a set-off: in reference to the amount by which it exceeded the plaintiff's claim, it operated as a cross-action, recovering in which the defendant would be entitled to his costs. A fortiori would this be the case if the counter-claim is to be treated as a cross-action to the full extent of the defendant's demand.

It is true that the Court of Appeal, while upholding the judgment of the Common Pleas Division, appear to have done so on a different ground, namely, that by the terms of the order of reference, the costs were to abide the event, and that the decision of the master that on the balance of account the plaintiff owed the defendants 6*l.* 18*s.* 7*d.* was the event.

I am not at all sure that I rightly appreciate the meaning or effect of this decision. In one sense, indeed, but in one sense only, the decision of the master that the plaintiff owed the defendant 6*l.* 18*s.* 7*d.* may be said to have been the event on which the costs would depend. The counter-claim, being, so far as it was co-extensive with the plaintiff's demand, a plea of set-off, would, on being established, defeat the plaintiff's right of action, and so entitle the defendant to costs. A fortiori was this the case, when, after thus extinguishing the plaintiff's claim, the counter-claim, operating as it did, as a cross-action, established a cause of action against the plaintiff.

If, however, the ratio decidendi in *Chatfield* v. *Sedgwick* (1) is to be taken to be, as from the language of the judgment would seem to be the case, that the provision in the order of reference makes the right to costs depend absolutely on whether the balance is on the side of plaintiff or defendant, I must respect-

(1) 4 C. P. D. 459.

fully dissent from such a position, and can only hold myself bound by the decision where the facts with which I have to deal are precisely the same as those in *Chatfield* v. *Sedgwick* (1), which certainly is not the case here.

The effect of such an order of reference is, I apprehend, simply to substitute the reference, as regards the issues of fact, and the legal consequences resulting from them, for the trial by judge and jury. The provision that the costs of the action shall abide the event amounts to no more than that whatever would have been the legal effect of the verdict and judgment as regards costs shall remain the same as if the verdict of the jury had been taken and judgment had followed thereupon. It cannot be taken to mean that where the counter-claim is in effect a cross action, founded on an independent cause of action, and not a mere set-off—as, for instance, where the one party claims liquidated, the other unliquidated damages, or where the claim of the one is founded on contract, that of the other in tort—the balance of the amount awarded on their respective claims is to constitute the event, so as to entitle the party in whose favour such balance is found, to the costs of the action. When claim and counter-claim are in effect cross actions, the term event, as here used, must be taken as applicable to each. Damages are in effect awarded in each, and costs ought equally to be assessed in each, although, by the effect of the statute, judgment is given for the difference only between the amount adjudged on each, and as was pointed out by Brett, L.J., in *Winterfield* v. *Bradnum* (2) the allocatur for costs should be for the difference only. Where the only issue is whether, or to what extent, a plaintiff can make out his claim, or where the defence consists of mere set off, though pleaded in the form of a counter-claim, the award of the arbitrator as to amount may well be held to be the event on which the costs are to depend. But where the counter-claim is in effect a cross action, which under the new system may be in tort as opposed to an action ex contractu, or vice versâ, to hold that the right to costs is to depend on which way the balance of the damages awarded may be, as the event by which the right is to be determined, would obviously in many cases lead to grievous injustice. The proof of the one party may

(1) 4 C. P. D. 459. (2) 3 Q. B. D. 324.

1880.

STOOKE v. TAYLOR.

Cockburn, C.J.

17 Q.B.D. 180

be of a complicated character, involving much expense, that of the other extremely simple. To say that A., who has been put to heavy expense in establishing his claim, of which B., by disputing it, has put him to the proof, is to be deprived of the costs of his action because B., in a cross action, possibly of a totally different character, succeeds in establishing a claim to a few pounds, or even shillings, more, or vice versâ, appears to me, I must say, inconsistent with reason and justice. If the intention of the parties is that the costs shall depend absolutely on the event as so understood, it will be easy to say so express. But in the absence of any such expressed intention we ought not to give such an effect to the word "event." Such a rule would, moreover, lead to this anomaly. It would have the effect, where the balance was in favour of the plaintiff, but for a sum not above 20*l.*, of doing away with the effect of the County Court Acts as to costs. For if the event on which the costs are to depend is to be determined absolutely by the existence of a balance, independently of its amount—not on how much the plaintiff may recover, but on whether he recovers anything above the amount recovered by the defendant on the counter-claim—the necessary effect will be that, the costs depending on the mere fact of a balance, however small, upon every such reference, the salutary rule of the County Court Acts will be superseded. In *Chatfield* v. *Sedgwick* (1), for instance, the balance might have been the other way, and yet the plaintiff might not have established a claim over 20*l.* Yet, according to the principle on which the judgment rests, he would have been entitled to his costs of the action, in spite of the County Court Acts.

I cannot concur in such a conclusion, and, therefore, as I have said, can only hold myself bound by the decision where the facts are the same as in *Chatfield* v. *Sedgwick*. (1) There both claim and counter-claim were for liquidated damages; here the claim is partly for liquidated, partly for unliquidated damages; the counter-claim is wholly for unliquidated damages: so that the counter-claim is to all intents and purposes a cross action, which distinguishes the case from *Chatfield* v. *Sedgwick*. (1) I feel myself at liberty, therefore, to exercise an independent judgment

(1) 4 C. P. D. 459.

on the case before us, and am of opinion that the plaintiff is entitled to the costs on his claim, the defendant to his costs on the counter-claim.

FIELD, J. This was a motion on the part of the defendant to rescind so much of an order of Stephen, J., as directed that the plaintiff should recover his costs and charges of the action, or that the defendant should recover his costs and charges of his counter-claim, under the following circumstances.

The action was brought to recover, first, 10*l.* for rent admittedly due by the defendant; and, secondly, unliquidated damages for breach of covenant in respect of the same premises (100*l.*), and for conversion of the plaintiff's goods (30*l.*).

The defendant admitted that the 10*l.* were due, but put in issue the breaches of covenant and conversion, and defended for the whole by a counter-claim for, first, unliquidated damages for breach of covenant by the plaintiff (claiming 100*l.*), and, secondly, for money due for use and occupation of other premises, and claiming 15*l.*

At Nisi Prius this action was referred to an arbitrator by an order made by consent, and the reference was upon the terms "that the costs of the action should abide the event and determination of the award or certificate, and that the costs of the reference and award or certificate should be in the discretion of the arbitrator." There was also the further usual term that the arbitrator might "find generally for the plaintiff, or for the defendant, and need not find upon any specific issue, unless required so to do."

The arbitrator was not required by either party to find upon any specific issue, and by his first award he awarded generally that the plaintiff was entitled to 15*l.* and no more, without stating upon what issue or issues that amount was due. By his second award, made in pursuance of an order of Court, he found that the plaintiff was entitled to 10*l.* for rent. That the defendant had broken his covenant to repair, and had been guilty of the conversion charged, and awarded that the plaintiff was entitled to recover in respect of such breach of covenant and conversion the sum of 25*l.*, making together 35*l.* awarded to the plaintiff. He also found that the plaintiff had broken his covenant, as alleged

1880

STOOKE v. TAYLOR.

Field, J.

by the defendant, and that the latter was entitled to recover in respect of that breach 20*l.* And so he found upon the whole matter that the plaintiff "was entitled to recover in the action the sum of 15*l.* and no more."

Now, in the view which I take of this case, it seems to me unnecessary to consider what might have been the result of this application if the contest between the parties in the action had proceeded to trial in any of the ways provided by law for that purpose, and if its course to such a trial had not been intercepted by the consent of the parties and the order of reference. The question which would have arisen in that event would have involved the construction of many enactments and rules, and the application to them of a series of decisions, some of which appear to me difficult to reconcile with each other, and in accordance with some of which I should be only able to decide because I thought myself bound to do so.

I have, however, in consequence of the views of my Lord and my Brother Manisty, very fully gone through those enactments, rules and decisions, and having been favoured with a perusal of my Lord's judgment, and as I understand that my Brother Manisty agrees in principle with that judgment, I am glad to say that I see no reason to dissent from the conclusions at which they have arrived, so far as those are based on the assumption that the agreement between the parties as expressed by the order of reference has not altered their position. But it seems to me that the agreement of the parties has had that effect, for by it the course of action on its way to trial was arrested and that the rights of the parties as to costs depend upon the construction of the order and of the award made under it.

Now the true construction of such an agreement and award seems to me to have been decided by the Court of Appeal in the case of *Chatfield* v. *Sedgwick* (1), by which decision I should be bound, even if I did not, as I do, concur in it.

The facts of that case were that the plaintiff sued the defendant for work done and money lent. The defendant set up a counter-claim for goods supplied.

The action was by consent referred to the Master and by the

(1) 4 C. P. D. 459.

order the costs of the action were to abide the event as in the present case.

The Master found that the defendant owed the plaintiff 16*l.* 1*s.* 5*d.* and that the plaintiff owed the defendant 23*l.*, so that on the whole the plaintiff owed the defendant 6*l.* 18*s.* 7*d.* And in that state of things the Master of the Rolls and Brett, L.J. (the other Lords Justices concurring) held that upon the true construction of the order, the question referred was, which of the parties, taking claim and counter-claim together, was the creditor and which the debtor, and the Master having found in favour of the defendant, that was the event which the costs were to follow.

I am unable to distinguish that case in principle from the present, and I hold therefore in this case that the plaintiff is entitled to the costs of the action and that the defendant is not entitled to any, and so the order of Stephen, J., stands without any variation or addition.

There is no doubt, as is pointed out by my Lord, one difference between that case and the present in this respect, viz.: that in *Chatfield* v. *Sedgwick* (1) the matter set up by counter-claim was to the extent by which it was less than the sum to which the plaintiff was entitled in the nature of a set-off, and as to the residue in excess of the plaintiff's claim was in the nature of liquidated damages—which might have been made a shield by way of set-off had the plaintiff's rightful claim been larger—

But as the litigation stood at the time of the agreement the counter-claim only operated as a set-off to the extent of the 16*l.* 1*s.* 5*d.* recovered by the plaintiff and as a cross action as to the residue. And inasmuch as the ratio decidendi in *Chatfield* v. *Sedgwick* (1) was that the language used by the parties evinced an intention that the party who should succeed in obtaining an award in his favour for the balance after taking all the claims into consideration should be entitled to his costs, I am not able to see that the nature of the counter-claim can under such circumstances make any distinction between the two cases in principle.

If parties choose before going into an expensive inquiry to stake the costs upon the final balance, each does it with full know-

(1) 4 C. P. D. 459.

1880

STOOKE v. TAYLOR.

Field, J.

ledge that the other party's claims are liquidated or unliquidated or are matters of set-off or counter-claim, as the case may be, and at the time when the agreement is made the precise limits of the campaign are fully or exactly marked out and known to both sides.

They may, and I think, often do, prefer to make the costs dependent upon the final result, rather than upon the very complicated and difficult to be ascertained question of cross costs and costs of issues.

And in such a case there is of course no injustice in holding them to their bargain.

I arrive therefore at the result I have done, with the greatest respect for the judgments of my Brethren with which mine is in conflict, but with a clear conviction that I am bound by the decision of the Court of Appeal and a cordial concurrence in what appears to me to be its principle.

64 QBD 200 — 693

MANISTY, J. Having regard to the exhaustive judgment pronounced by the Lord Chief Justice I might content myself by saying that I concur in it, but as the case will probably, for obvious reasons, be carried to a higher tribunal, and it is one of considerable importance, I have thought it right to add a few observations of my own.

I conceive that there is a broad distinction between matter of set-off and matter of counter-claim, properly so called. And I cannot help thinking that the diversity of opinion which unfortunately is to be found in several of the decided cases bearing more or less directly upon the point now raised, is owing to due regard not being had to that distinction.

In the case of a set-off, properly so called, the plaintiff has it in his power, whether his action be brought in a superior Court or in a county court, to give credit for the amount of the set-off and to sue for the balance really due to him. If that balance be less than 20*l.* (the action being founded, as it must be in contract in order to admit of a set-off) then by virtue of the 5th section of the County Courts Act, 1867, the plaintiff, unless he obtain a certificate or order, is not entitled to any costs—the reason being that the relief sought could be given in the county court if the plaintiff

exercised his right to give credit for the defendant's set-off—and sued for the balance really due.

A counter-claim, properly so called, is the creature of the Judicature Act, 1873. It is an independent suit, which, for the sake of convenience of procedure may be tried at the same time as the claim (see per Brett, L.J., in *Winterfield* v. *Bradnum* (1)). It differs essentially from a pure set-off. Assuming a plaintiff to have a good claim, founded either in contract or tort, for a sum exceeding 50*l.* he cannot, by giving credit for an amount not the subject of set-off, but which can only be recovered by way of counter-claim or cross action, get relief in a county court—therefore, notwithstanding the defendant by a counter-claim recovers a sum which, when the verdicts on the claim and counter-claim come to be set off one against the other, leaves a balance due to the plaintiff of less than 20*l.* or 10*l.* as the case may be, and for which he obtains judgment, still the plaintiff is entitled to his costs of and relating to his claim, and why? because he has *recovered by verdict* (see s. 5 of the County Court Act, 1867) more than 20*l.* or 10*l.*, as the case may be; and in like manner the defendant in such case is entitled to his costs of and relating to his counter-claim: see *Cole and Others* v. *Firth and Another.* (2) In that case the plaintiff recovered on his claim for work and labour 371*l.*, and the defendant recovered on his counter-claim as damages for breach of contract (which of course could not be the subject of set-off properly so called) 375*l.*, leaving a balance due to the defendant of only 4*l.*, for which he obtained judgment; the Court held that the plaintiff was entitled to his costs of and relating to his claim, and that the defendant was entitled to his costs of and relating to his counter-claim.

The only distinction that I can see between that case and the present is that in the former the sum recovered by the plaintiff on his claim exceeded the sum of 50*l.* (consequently he could not have obtained relief in the county court), whereas in the present case the plaintiff recovered less than 50*l.*, namely, 25*l.* as and for unliquidated damages, and 10*l.* for rent, making together 35*l.*; so that he might have sued, and obtained relief in the county court.

This brings me to the question whether this distinction between

(1) 3 Q. B. D. 324. (2) 4 Ex. D. 301.

1880

STOOKE v. TAYLOR.

Manisty, J.

the two cases makes any difference as regards the plaintiff's right to costs. It is contended, on the part of the defendant, that it does. It is said that the plaintiff is precluded from recovering his costs by the 67th section of the Judicature Act, 1873, inasmuch as he might have sued for and recovered the whole 35*l.* in the county court. All that the 67th section of the Judicature Act says is, that the 5th section of the County Courts Act, 1867, shall apply to all actions in the High Court of Justice in which any relief is sought which can be given in a county court. Now, it is true that the present action is one in which the relief sought by the plaintiff could have been given in the county court, but s. 5 of the Act of 1867 only operates to deprive a plaintiff of costs in the event of his not recovering more than 20*l.* or 10*l.*, as the case may be, and in this case the plaintiff did recover in respect of his claim more than 20*l.*, namely, 25*l.* for unliquidated damages (as to which there could be no set-off), and 10*l.* for a debt, making in all 35*l.*, consequently s. 5 has no operation in the present case.

In *Staples* v. *Young* (1) Cleasby and Pollock, B.B., are reported to have held that the right to costs depends upon the result of the cross verdicts on a claim and counter-claim, the intention of the Judicature Acts being, as they say, to place counter-claim and set-off upon the same footing. If those learned judges did so decide, their decision is, as it seems to me, in direct conflict with that of the same Court (composed of Kelly, C.B., and Pollock, B.), in the case of *Cole* v. *Firth* (2), to which I have already adverted, and also with that of the same Court, composed of Kelly, C.B., and Hawkins, J., in the recent case of *Neal* v. *Clarke*. (3) In that case the plaintiff claimed upwards of 1000*l.* on a balance of accounts; the defendant, nominally by way of set-off and counter-claim, but really by way of set-off only, claimed a larger sum. The cause was referred to arbitration; the costs of the cause to abide the event. The arbitrator awarded that the defendants were indebted to the plaintiffs in respect of their claim in the sum of 1067*l.* 0*s.* 6*d.*, and that the plaintiffs were indebted to the defendants, in respect of their set-off and so-called counter-claim,

(1) 2 Ex. D. 324. (2) 4 Ex. D. 301.
(3) 4 Ex. D. 286–292.

in the sum of 1055*l.* 10*s.* 3*d.*, which they were entitled to set off against the amount established by the plaintiffs, leaving a balance of only 11*l.* 10*s.* 3*d.* due from the defendants to the plaintiffs, for which they obtained judgment. The Court held that the plaintiffs and defendants were each entitled to the costs of the claims on which they had respectively succeeded, Hawkins, J., being of opinion that as the matters of the so-called counter-claim and set-off were matters of pure set-off, and consequently the case was one in which the plaintiffs could have sued in the county court for the sum really due to them, namely, 11*l.* 10*s.* 3*d.*, they were not entitled to any costs, but considering himself bound by the decision in *Potter* v. *Chambers* (1), he concurred in giving judgment for the plaintiffs with costs.

The only other case to which I need to advert is *Chatfield* v. *Sedgwick*. (2) This case is strongly relied upon by the defendant, and being a decision of the Court of Appeal I should of course feel bound to follow it, whatever my own opinion might be, provided it was in point, but I do not think it is.

No doubt there are dicta in that case which abstractedly support the defendant's contention, but the two cases are essentially different. In that case there was no verdict. The action which was in contract was referred to the Master pursuant to the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and he certified that there was due to the plaintiff in respect of his claim only 16*l.* 1*s.* 5*d.*, and that there was due to the defendant in respect of what was called his counter-claim (though it was really in part set-off and in part counter-claim) 23*l.*, and that the balance due from the plaintiff to the defendant was 6*l.* 18*s.* 7*d.*

Upon those findings the plaintiff could not, in any view of the case, be entitled to any costs, because the action being in contract and the sum found to be due to him being under 20*l.*, he was deprived of costs by the 5th section of the County Courts Act, 1867. That was the event of the reference so far as he was concerned, irrespective altogether of either set-off or counter-claim.

Then as regards the defendant, he was found not only to have a set-off to an amount equal to the sum due to the plaintiff, but

(1) 4 C. P. D. 457. (2) 4 C. P. D. 459.

1880

STOOKE v. TAYLOR.

Manisty, J.

that the plaintiff owed him 6*l.* 18*s.* 7*d.* more, which of course could only be recovered by counter-claim under the new system, or by cross-action under the old system. The event, therefore, so far as the defendant was concerned, was wholly in his favour; and the Court held that he was entitled to his costs. It was impossible for the Court, in any view of the case, to come to any other conclusion. And I think all that the learned judges meant was that, having regard to the findings on the claim and counter-claim, the plaintiff was not entitled to any costs, and that the defendant was entitled to the costs of and incidental to his counter-claim.

In the present case the action came on for trial at Nisi Prius, and a verdict was taken for the plaintiff on his claim for the nominal amount claimed, and for the defendant on the counter-claim, subject to a reference to a member of the bar on the well-known usual terms, the costs of the action to abide the event of the award or certificate, the costs of the reference and award or certificate to be in his discretion. Power was also given to the arbitrator to give judgment.

The arbitrator found by his amended award or certificate that the plaintiff was entitled to recover in respect of his claim 35*l.*, and the defendant in respect of his counter-claim 20*l.*; and in pursuance of the power given to him by the order of reference, without which he could not have done so, he gave judgment for the plaintiff for the difference—namely 15*l.*

The question is, what is the meaning of the term in the order of reference, "Costs of the action to abide the event of the award or certificate." But for the dicta in *Chatfield* v. *Sedgwick* (1), to which I have adverted, I should have thought costs of the action meant the costs of the claim and counter-claim respectively, and that "the event of the award or certificate" meant that the costs should follow just as they would have done if, instead of a verdict having been found for the plaintiff on the claim and for the defendant on the counter-claim, subject to a reference, the jury had found a verdict for the plaintiff for the sum certified by the arbitrator to be due to him in respect of his claim, and a verdict for the defendant for the sum certified by the arbitrator to be due to him in respect of his counter-claim. There can be no doubt

(1) 4 C. P. D. 459.

but that in such case judgment would have been given by the judge or the Court for the plaintiff for the difference, say 15*l.*, and each party would, according to the invariable practice, have been allowed his costs in respect of the matter upon which he had succeeded. An award or certificate in such a case stands in the place of a verdict. The power to enter judgment is a separate and distinct matter.

Before the Judicature Acts when a verdict was taken subject to a reference, costs of action to abide the event, and the arbitrator found some issues for plaintiff and some for defendant, the result being that the plaintiff was entitled to judgment, the master in taxing the costs as a matter of course disallowed the plaintiff the costs of the issues on which he failed, and allowed the defendant the costs of the issues on which he succeeded. So vice versâ, if the findings entitled the defendant to judgment, he got the general costs of the cause including the costs of the issues on which he succeeded, but the plaintiff was allowed the costs of the issues on which he succeeded.

I cannot see any reason why the term "costs of the action to abide the event of the award" should in a case like the present receive a construction different to that which it has always hitherto received.

By Order 55, rule 1, of the Judicature Act, 1875, it is enacted that where any action is tried by a jury the costs shall as a general rule follow the event. If the contention of the defendants be correct this result, as a general rule, would follow, namely, that in every case in which there is a claim and counter-claim and the plaintiff gets a verdict on his claim for a sum exceeding 50*l.* (it may be for thousands of pounds) and the defendant gets a verdict on his counter-claim for a larger sum, the defendant would be entitled to his costs, but the plaintiff would not be entitled to any.

I am at a loss to see any principle upon which such a result could be justified. Take the case of a plaintiff bringing an action for goods sold and delivered, in which he gets a verdict for, say, 100*l.*, and the defendant counter-claims for a libel and gets a verdict for, say, 105*l.*, so that judgment would be given for the defendant for 5*l.* If the defendant's contention in the present

1880

STOOKE v. TAYLOR.

Manisty, J.

case be right, the defendant in the supposed case would be entitled to his costs, but the plaintiff would not be entitled to any. Surely that would not be just, and I do not believe it is the law.

For these reasons, I am of opinion that the order of Stephen, J., which is appealed against, was right, and that consequently the appeal should be dismissed with costs. I am also of opinion that the defendant is, by virtue of the order of reference, and without any further order entitled to his costs of the counter-claim, but as the case is before us there may as well be an order for the Master to allow the defendant his costs.

Appeal dismissed.

Solicitor for plaintiff: *S. D. Hamilton, for J. W. Friend, Exeter.*

Solicitors for defendant: *Parkers.*

June 22.

[IN THE COURT OF APPEAL.]

THE PROTECTOR ENDOWMENT LOAN AND ANNUITY COMPANY *v.* GRICE.

Bond—Loan payable by Instalments—Balance payable upon default in payment of one Instalment—Interest and Expenses of Life Insurance—Penalty—Relief of Debtor.

16 Ch D 677

The plaintiffs lent money to S. upon his bond, under which the principal was to be paid in five years by instalments, in case the debtor should so long live, the instalments being calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, and a margin representing a premium for the insurance of the debtor's life. The condition of the bond made it void; first, if the instalments were regularly paid till the expiration of the five years, or till the death of the debtor, whichever should first happen; secondly, if all the instalments which would have become payable at the expiration of the five years, if the debtor lived so long, were at any time paid up, the balance of instalments being at once payable on the failure of any single instalment.

The defendant as surety executed the bond, and default having been made in payment of one instalment, the plaintiffs brought an action claiming the entire balance of unpaid instalments:—

Held (reversing the judgment of Bowen, J.) that the amount claimed was not a penalty and could be recovered.

APPEAL of the plaintiffs from the judgment of Bowen, J., after the trial.

The facts are sufficiently stated in the judgment of the learned judge (1), and it is unnecessary to repeat them here.

Sir F. Herschell, S.G., and *Fooks, Q.C.* (*Archibald*, with them), for the plaintiffs. Bowen, J., gave judgment for the defendant upon the ground that the stipulation for payment of the residue upon default was a penalty, and that the plaintiffs were entitled to recover only the instalment actually due at the time of default; it is submitted that the decision is erroneous: whether a stipulation is to be construed as a penalty, depends upon the intention of the parties at the time of entering into the contract: *Peachy* v. *Duke of Somerset* (2); *Sloman* v. *Walter*. (3) Here the penalty of the bond is 100*l.*, and to construe the stipulation for the immediate payment upon default of the remaining instalments as a penalty would be to create a penalty within a penalty. The insertion of a penal sum in the bond itself seems to shew that the parties did not intend that there should be a penalty in the condition. It must have been intended that the stipulation for immediate payment should be deemed part of the bargain between the parties. It is not a principle of equity to relieve in every case against a stipulation for the payment of a larger sum. An agreement must receive the same construction in equity as at law; and it was intended by the stipulation in question that the lenders should not run any risk of losing the amount of their advance; the acceleration of payment was to secure the plaintiffs against any hazard of failing to obtain repayment; an acceleration of payment will not of itself in equity avoid a contract: *Sterne* v. *Beck* (4); *Thompson* v. *Hudson*. (5) At all events the plaintiffs were entitled to judgment for the whole amount of the bond as a security in case of future breaches.

Bompas, Q.C., and *Forrest Fulton*, for the defendant. The principle upon which a stipulation is to be treated as a penalty is correctly stated by Mellish, L.J., in *Ex parte Hulse; In re Dagenham (Thames) Dock Co.* (6): "I have always understood that

(1) Ante, p. 121.
(2) 2 W. & T. L. C. 5th ed. p. 1100.
(3) 2 W. & T. L. C. 5th ed. p. 1112.
(4) 1 De G. J. & S. 595; 32 L. J. (Ch.) 682.
(5) Law Rep. 4 H. L. 1.
(6) Law Rep. 8 Ch. 1022, at p. 1025.

1880

THE PROTECTOR LOAN CO. v. GRICE.

where there is a stipulation that if on a certain day an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." This dictum applies to the present case; the loan was 50*l.*, and the debtor was to pay by instalments 20*l.* for the accommodation; but according to the construction of the plaintiffs, upon one default the debtor is to lose all further benefit of the accommodation, and to repay the remaining balance at once. This is at variance with the principle upon which equity relieves, which is, that it is proper to put a debtor, who has failed to pay on a certain day, in the same position after payment upon a subsequent day, as if he had paid punctually. The provision that an estate or interest is to be forfeited upon insolvency, may be a penalty against which equity would not relieve; but that is a very different provision from the stipulation in the present case, that upon default the debtor and his sureties shall bear the burden of repayment sooner than was otherwise contemplated.

[BRETT, L.J. This is not a case where the debtor is called upon to pay an increased sum.]

The payment is accelerated, and that is sufficient to constitute a penalty.

The plaintiffs are not entitled to judgment as security for future breaches; they have not followed the procedure necessary to entitle them to that remedy.

But further, it is to be recollected that this is an action against a surety; and although the stipulation for acceleration of payment may not be a penalty against the principal debtor, yet it is a penalty against the surety.

Sir F. Herschell, S.G., was not called upon to reply.

COCKBURN, C.J. The judgment of Bowen, J., is founded upon a misapplication of the rule, that a penalty for the non-performance of a contract cannot be construed literally. The clauses in question in the present case were essential parts of the contract; it is an agreement for a discharge by quarterly instalments of the whole debt, but if there is a failure to perform the agreement, a condition

is inserted that the whole amount shall become payable at once; it is not merely a mode of securing payment of the instalments. If the payment of an additional sum of money is mentioned only for the purpose of inducing persons to fulfil their contract, it is not to be literally enforced in a court of justice; but here it was contemplated that the terms of the contract should be fulfilled, and we do not doubt that it was intended that the whole amount should become due upon non-payment of an instalment. I think that there ought to be judgment for the plaintiffs.

BAGGALLAY, L.J. I am of the same opinion. The doctrine in equity is stated by Lord Macclesfield, L.C., in *Peachy* v. *Duke of Somerset*: (1) "The true ground of relief against penalties, is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired;" but it has been long established, that relief in equity is also given where the penalty is intended to secure the performance of a collateral object: *Sloman* v. *Walter*. (2) Familiar instances of the relief afforded in equity, may be found in those cases where a default has occurred in repayment of a loan secured by a mortgage; but where the intent is not simply to secure a sum of money, or the enjoyment of a collateral object, equity does not relieve. It may be assumed from the relation of the parties, that they intended to carry out the terms of the agreement; it was competent to them to determine that the loan should be repayable in the manner mentioned; it was worth the while of the parties that the money should be borrowed upon the terms mentioned in the condition, and it would be an act of injustice to the lenders to give judgment for the defendant.

BRAMWELL, L.J. I am glad that the other members of the Court have come to the conclusion that the plaintiffs are entitled to judgment; but I have some difficulty in seeing that Bowen, J., was wrong. It ought to be presumed that the parties to a contract mean what they say, and, to take one instance, a proviso in a lease for years for re-entry upon non-payment of rent is construed literally,

(1) 2 W. & T. L. C. 5th ed. p. 1100, at p. 1108.
(2) 2 W. & T. L. C. 5th ed. p. 1112.

1880

THE PROTECTOR LOAN CO. v. GRICE.

and the lessor is entitled to enter whenever the rent has fallen into arrear; but even in this case relief against forfeiture may be obtained, both in equity and by statute subject to certain conditions. In other cases the Court of Chancery said that a penalty to secure the payment of a sum of money or the performance of an act should not be enforced; the parties were not held to their agreement; equity in truth refused to allow to be enforced what was considered to be an unconscientious bargain. Apart from the authorities which bind us, I do not quite assent to the principle upon which this doctrine is founded. A definition of the principle may possibly be that where a sum is payable as a punishment for a default, or by way of security, and the realization of that sum is not within the original intention of the parties, the sum is a penalty; but when it forms part of the original intention, that upon default a sum otherwise payable at a future period, shall become forthwith payable, it is no longer a penalty. I do not know whether this definition is correct; I admit that it is somewhat vague, but it is the best definition which at the present moment presents itself to me. Upon the whole, as far as I can understand the question, the stipulation in question is not a penalty. I do not feel any doubt as to the question that the defendant is only a surety; if it was part of the original intention, that the money should be repaid forthwith upon default, it is part of the bargain which binds the surety.

BRETT, L.J. I think that this is not a case of a penalty. The contract is that the borrower shall repay 70*l.*, there is no other debt, and no other sum is mentioned. It is an agreement to repay by quarterly instalments; but if default should be made, then the whole sum of 70*l.* was to become payable at once. In my opinion the stipulation to pay immediately is not to be treated as a penalty; but a stipulation to pay a large sum upon default would be a penalty, and could not be recovered: *Sterne* v. *Beck* (1) and *Thompson* v. *Hudson* (2) shew what the true rule is; if a larger sum is to be paid upon default, it is a penalty; a stipulation to pay upon default a sum not larger than the total amount is not a penalty. The chief ground of the judgment of Bowen, J., cannot

(1) 1 De G. J. & S. 595; 32 L. J. (Ch.) 682. (2) Law Rep. 4 H. L. 1.

be upheld. I do not think that the fact of the defendant being only a surety makes any difference as to his liability.

Judgment reversed.

Solicitor for plaintiffs: *T. H. Devonshire.*
Solicitors for defendant: *Cronin & Rivolta.*

[IN THE COURT OF APPEAL.]

March 18.

POWELL AND ANOTHER *v.* FALL.

Locomotive Act, 1861 (24 *&* 25 *Vict. c.* 70)—*Locomotive Act*, 1865 (28 *&* 29 *Vict. c.* 83)—*Nuisance*—*Highway.*

The defendant was possessed of a traction engine, which was propelled by steam power. Whilst it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861, 1865; at the time of the accident it was being driven at a proper pace, and the defendant's servants were guilty of no negligence in the management of it:—

Held, that the defendant was liable to compensate the plaintiffs for the injury done to the stack, upon the ground, that the engine being a dangerous machine, an action was maintainable at common law, and the Locomotive Acts did not restrict the liability of the defendant.

THE facts of this case are stated in the following judgment, delivered upon further consideration, by

MELLOR, J. This was an action tried before me at Devizes without a jury. It was brought by the plaintiffs to recover a sum of 53*l.* 6*s.* 8*d.*, in respect of injury done to a rick of hay upon a farm of the plaintiff, John Thomas Powell, adjoining a public highway, and which injury was caused by sparks escaping from the fire of a traction engine belonging to the defendant, which was then being propelled by steam power along the highway. The engine was constructed in conformity with the provisions of 24 & 25 Vict. c. 70, and of 28 & 29 Vict. c. 83, being the Acts then in force for regulating the use of locomotives on turnpike and other roads.

At the time when the injury was occasioned to the hay stack by

1880

POWELL v. FALL.

the sparks of fire issuing from the defendant's engine, it was not travelling at a greater speed than that prescribed by the Acts referred to, nor was the injury occasioned by any negligence on the part of the defendant's servants conducting or managing the same, and the question which I reserved for further consideration was, whether the owner of a locomotive engine propelled by steam along a public highway using a fire for the purpose of generating the steam required to propel such engine, and which engine was constructed in conformity with the provisions of the Locomotive Acts above referred to, and was managed and conducted with all reasonable care and without negligence, was liable to the plaintiffs for injury occasioning damage to a rick of hay standing on land adjoining the highway by sparks proceeding from such engine and firing the hay. It was contended on the part of the plaintiffs that although the Acts regulating the use of locomotives on turnpike roads and public highways might warrant the use of locomotives properly constructed, and not proceeding faster than the prescribed speed, still they did not exempt the owners of such locomotive engines from liability for injury or damage occasioned to others from the use of such locomotive engines, and they alleged that by the very terms of the 13th section of 24 & 25 Vict. c. 70, and particularly of the 12th section of 28 & 29 Vict. c. 83, their liability at common law was expressly preserved to the persons, who might suffer injury arising from the use of such locomotives. The 13th section of 24 & 25 Vict. c. 70, is as follows: "Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine, which shall be so constructed or used as to cause a public or private nuisance, and every such person so using such engine shall notwithstanding this Act be liable to an indictment or action as the case may be, for such use where, but for the passing of this Act, such indictment or action could be maintained:" and by s. 12 of 28 & 29 Vict. c. 83, it is enacted that "Nothing in this Act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive." And it was further

contended on the part of the plaintiffs that whilst the Acts entitled the defendant to use a locomotive properly constructed on the public highway, yet it never was intended by the legislature to exempt him from liability to damages in respect of any injury sustained by third persons in consequence of the use by him of a locomotive, and that it was wholly immaterial to the result that such injury arose from no want of care or negligence on the part of the defendant's servants in the management and use of the same. On the part of the defendant it was contended that the effect of the several statutes being to authorize the use of locomotives on public highways, if constructed and managed according to the provisions of such statutes, was to exempt the owners from liability to make good any injury arising from the use of locomotives, unless some improper construction of the engine, or some act of negligence in the use of it, could be imputed to such owners or their servants. I am of opinion that the contention on the part of the plaintiffs must prevail.

The principle which governs this case is that established by *Fletcher* v. *Rylands* (1), and affirmed in the House of Lords: *Rylands* v. *Fletcher* (2), which overruled the decision of the majority of the Court of Exchequer, and supported the view taken by Bramwell, B., in that Court. That case, which settled, as I think, the principle, upon which the result of this case depends, is "that when a man brings or uses a thing of a dangerous character on his own land, he must keep it in at his own peril and is liable to the consequences, if it escapes and does injury to his neighbour." In the present case the defendant brought along the public highway a locomotive propelled by steam generated by fire, and although that act might be justified by the provisions of the locomotive statutes, yet the authority conferred by these statutes to use locomotives on public highways is not an unqualified authority, as was the case in *Vaughan* v. *Taff Vale Ry. Co.* (3) and in *Rex* v. *Pease* (4), but is a qualified authority only, and does not extend to protect the defendant from liability to damages in respect of any injury, he may have occasioned in consequence of the use by him of a locomotive engine on the

(1) Law Rep. 1 Ex. 265.
(2) Law Rep. 3 H. L. 330.
(3) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(4) 4 B. & Ad. 30.

1880

POWELL v. FALL.

highways. *Jones* v. *Festiniog Ry. Co.* (1) is entirely in point, and in my opinion, governs the present case. In that case, as in this, an action had been brought by the plaintiff to recover damages by reason of a haystack having been fired by sparks from a locomotive engine. There, as here, the defendants contended that the statute under which they worked and used their locomotive, prevented any liability for damage occasioned by such working and use; but the Court held, distinguishing it from *Rex* v. *Pease* (2) and *Vaughan* v. *Taff Vale Ry. Co.* (3), that the Act authorizing the making and use of the railway in that case did not exempt them from liability to make good the damage done to the plaintiff by an accidental fire occurring in the use of a locomotive engine without negligence. Now in the cases under consideration, the right to recover for damages is expressly reserved to a person sustaining injury from the use of locomotive engines authorized by those statutes. It is therefore a stronger case than that of *Jones* v. *Festiniog Ry. Co.* (1) Upon principle and authothority, therefore, I am satisfied that judgment ought to be entered for the plaintiffs.

The defendant appealed.

Cave, Q.C., and *Kinglake*, for the defendant. The judgment of Mellor, J., was wrong: he relied upon the principles laid down in *Rylands* v. *Fletcher* (4) and *Jones* v. *Festiniog Ry. Co.* (1) These were not cases of statutory authority such as was conferred upon the defendant by the Locomotive Act, 1865 (28 & 29 Vict. c. 83). The case falls within the authority of *Vaughan* v. *Taff Vale Ry. Co.* (3)

A. Charles, Q.C., and *Bullen*, for the plaintiffs, were not called upon to argue.

BRAMWELL, L.J. I think that the judgment of Mellor, J., ought to be affirmed. The passing of the engine along the road is confessedly dangerous, inasmuch as sparks cannot be prevented from flying from it. It is conceded that at common law an action may be maintained for the injury suffered by the plaintiffs. The

(1) Law Rep. 3 Q. B. 733.
(2) 4 B. & Ad. 30.
(3) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(4) Law Rep. 3 H. L. 330.

Locomotive Acts are relied upon as affording a defence, but instead of helping the defendant they shew not only that an action would have been maintainable at common law, but also that the right to sue for an injury is carefully preserved. It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage. The plaintiffs are protected by the common law, and nothing adverse to their right to sue can be drawn from the statutes: the statutes do not make it lawful to damage property without paying for the injury. A great deal has been said about the liability of persons who have stored water which has subsequently escaped and done injury, and it has been urged that the emission of sparks from an engine is not so mischievous as the overflow of a large body of water. The arguments which we have heard are ingenious; but I need only say in reply to them that they have hardened my conviction that *Rex* v. *Pease* (1) and *Vaughan* v. *Taff Vale Ry. Co.* (2) were wrongly decided.

BAGGALLAY, L.J. I agree. It is hardly contended that the defendant is not liable at common law: but s. 5 of the Locomotive Act, 1865, is relied upon as affording a defence, but I think it quite clear that the right at common law is preserved by s. 12.

THESIGER, L.J. I am of the same opinion. It is conceded that the defendant would be liable if there had been no statutes; but the statutes have restricted the rights previously existing, whilst they keep up all remedies for injuries which may be inflicted either upon the community at large or individuals.

Judgment affirmed.

Solicitors for plaintiffs: *Kingsford & Dorman.*
Solicitors for defendant: *Rickards, Maude, & Maude.*

(1) 4 B. & Ad. 30. (2) 5 H. & N. 679; 29 L. J. (Ex.) 247.

1880
April 17.

[IN THE COURT OF APPEAL.]

ANDERSON AND ANOTHER *v.* OPPENHEIMER.

Landlord and Tenant—Injury from bursting of Water Pipe—Premises let in Floors—Covenant for quiet Enjoyment.

The defendant was owner of a house, which he let out in floors to separate tenants. The plaintiffs became tenants of the ground floor and basement under a lease, by which the defendant covenanted that the plaintiffs might "peaceably hold and enjoy the demised premises during the term without any interruption by the defendant." The different floors were supplied with water by a cistern at the top of the house, and the water was distributed by a main pipe connected with the cistern, each floor having a separate branch inserted in the main pipe. The defendant paid the water rate, receiving from the plaintiffs one half of the amount so paid, and the cistern was not demised to any one of the tenants. In consequence of the bursting of the branch service pipe supplying the first floor, a quantity of water flowed into the basement and injured the plaintiffs' goods. At the trial the jury found that the branch pipe was reasonably fit and proper for the purpose for which it had been fixed, and that the defendant had not been guilty of any negligence in keeping and maintaining it:—

Held, affirming the judgment of Field, J., that under the circumstances there had been no breach of the defendant's covenant for quiet enjoyment, and that as the water had been stored in the cistern for the benefit of the plaintiffs as well as of the other tenants, the doctrine laid down in *Rylands* v. *Fletcher* (Law Rep. 3 H. L. 330) did not apply.

STATEMENT OF CLAIM.

1. On the 22nd of October, 1872, the defendant by deed let to the plaintiffs the ground floor and basement of a house and premises known as Victoria Buildings, Queen Victoria Street, in the City of London, for a term of twenty-one years, from the 25th of March, 1872, at the yearly rent of 800*l.* payable quarterly.

2. By the said deed the defendant for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiffs that they might peaceably hold and enjoy the said demised premises during the said term without any interruption by the defendant, his executors, administrators, or assigns, or any person lawfully claiming through, under or in trust for him.

3. The plaintiffs have from the date of the said deed occupied, and still occupy the said demised premises upon the terms aforesaid.

4. The defendant caused a large cistern measuring about thirteen feet long by three feet wide, and three feet deep to be placed at the top of the said house, and the same to be filled with water daily; the defendant also caused a pipe to be fitted to the said cistern, and carried down the wall of the said house for the purpose of conveying water to a lavatory upon the first floor of the said house occupied by one Joseph Langton as tenant of the defendant, and the defendant so negligently constructed and used the said cistern and pipe, and failed to keep the same in good repair and condition, that large quantities of water penetrated and flowed into the ground floor and basement occupied by the plaintiffs, and wetted, damaged, and destroyed goods of the plaintiffs, being in the said ground floor and basement, and whereby also the plaintiffs were prevented from peaceably holding and enjoying the said demised premises, and whereby the plaintiffs were put to considerable expense in removing the water and in making the said demised premises fit for use in their said business.

The defendant by the statement of defence admitted the first paragraph of the statement of claim subject to some qualification; and the defendant also admitted the second and third paragraphs.

4. To the fourth paragraph: The defendant had before the said demise caused a cistern to be placed at the top of the said house. It is not admitted that the measurements stated by the plaintiffs are correct. The said cistern was filled with water daily by a water company with the authority of the plaintiffs and the respective tenants of the several floors of the said house. The defendant did not cause it to be filled. The defendant had caused a pipe to be fitted to the said cistern and carried down the wall of the said house to a lavatory upon the first floor of the said house occupied by the said Joseph Langton, and thence to a water-closet and lavatory in the premises demised to the plaintiffs. The said cistern and pipe were constructed at or about the time when the said house was built, and were a fit and proper contrivance for supplying the plaintiffs and the said other tenants of the said several floors with water. The plaintiffs' water-closet and lavatory were parts of the premises demised to the plaintiffs together with the use of the said cistern and pipe for supplying

1880

ANDERSON v. OPPENHEIMER.

the same with water. The said lavatory of the said Joseph Langton was part of the premises demised to him. The said cistern and pipe were not negligently constructed. They were constructed by skilled and proper persons, and planned and superintended in their construction by skilled and proper persons. The defendant did not use the said cistern at all, and in any case he did not use the same negligently. The plaintiffs and the said other tenants did use the same. The said pipe did not get out of good repair and condition. The said cistern did not get out of good repair or condition. The defendant was under no obligation to keep the said cistern or the said pipe in good repair or condition. In any case the alleged want of repair did not nor did the alleged escape of water occur through any negligence or default of the defendant. Some quantity of water did penetrate and flow into the premises occupied by the plaintiffs and caused some damage. The defendant denies that large quantities of water so penetrated or flowed, and he also denies that any goods of the plaintiffs were wetted, damaged, or destroyed. The plaintiffs were not prevented from peaceably holding and enjoying the said demised premises. They have in fact peaceably and quietly held, occupied and enjoyed the said demised premises without any interruption by the defendant or his assigns, or any person lawfully claiming through, under, or in trust for the defendant. No such interruption has occurred. The plaintiffs have not been put to any expense.

The plaintiffs by their reply joined issue.

The action came on for trial before Field, J. The facts are fully stated in the judgment of the learned judge delivered upon further consideration.

July 21, 1879. The following judgment was delivered by

FIELD, J. This action was tried before a special jury at the Guildhall Sittings. It was brought to recover damages for injury done by a quantity of water to the plaintiffs' stock-in-trade on the 13th of May, 1876, under the following circumstances :—

The defendant is the owner of a large house known as Queen Victoria Buildings, in Cannon Street, in the city of London, which is fitted up and let out in different floors, or flats, to various

tenants, and the plaintiffs are the tenants of the ground floor and basement under a lease dated the 22nd of October, 1872.

The house was built by the defendant, and finished in the year 1871, and the water supply to the different floors was effected by means of a cistern at the top of the house supplied with water by the New River Company, and the water is distributed to each floor by means of a down service pipe connected with the cistern, and into which pipe is inserted, at the junction of each floor, a branch service pipe supplying water for the use of the tenants of the floor, each floor having thus its separate branch pipe.

The cistern is filled by the New River Company, the defendant paying the water-rate by arrangement with the tenants, receiving from the plaintiffs one half of the total sum paid. The cistern is not demised to any of the tenants of any of the floors. The injury to the plaintiffs' stock-in-trade, in respect of which the action is brought, arose from the sudden bursting of the branch service pipe supplying the first floor, the water from which poured down into the basement where the plaintiffs' goods were stored. The part of the pipe which so burst was not open to view, and there was no evidence of any previous patent defect.

At the trial the jury found, in answer to questions put by me, first, that the branch pipe was, when fixed, a reasonably fit and proper pipe for the purpose for which it was fixed and intended to be used, and that the defendant had not been guilty of any want of care and skill in keeping and maintaining the pipe where and as it was. Upon these findings I entered the verdict for the defendant, as to so much of the plaintiffs' statement of claim as alleged a cause of action arising from the defendant's negligence in those respects.

But the plaintiffs claimed a verdict and judgment upon the remainder of the claim, which set out a covenant in the lease by which the defendant covenanted that the plaintiffs might "peaceably hold and enjoy the demised premises during the said term without any interruption by the defendant;" and I reserved that question for further consideration.

I now give my judgment upon it for the defendant.

The flow of the water into the plaintiffs' warehouse to the extent proved is, I think, such an interference with the plaintiffs'

1880

ANDERSON v. OPPENHEIMER.

possession as to amount to an interruption within the meaning of the covenant, and if that interruption had been caused by any wilful act of the defendant: *Andrews* v. *Paradise* (1), or a probable or necessary consequence of any act of the defendant: *Shaw* v. *Stenton* (2), I should have held that there had been a breach of the covenant for quiet enjoyment. But in the present case the water, although in a sense brought into the cistern by the defendant (he being the person who in fact contracted with the New River Company for its supply), yet it was so brought for the necessary enjoyment of the demised premises by the plaintiffs, amongst others, and at their request and upon their payment, and was an act contemplated before and necessary to, and not an interruption of, enjoyment. The only wilful act done by the defendant towards the injury, other than the collection and distribution of the water, was the fixing of the pipes by which the water was distributed. This was also done before the demise, and was in like manner an act in contemplation, and not an interruption, of the enjoyment.

It is unnecessary to say whether, if the defendant had knowingly or carelessly fixed insufficient pipes, or failed to keep in good repair and condition pipes originally properly fixed, such acts would have amounted to a breach of the covenant, for the jury have found that he was not guilty of any such negligence or want of care. There is no doubt that the plaintiffs have sustained a serious loss, and from no fault of their own; but unless I can see my way in accordance with law to throw this loss upon the defendant, the burden of it must fall where the principles of law leave it, and the injury must be added to the list of those losses which happen to every one engaged in the affairs of life and commerce.

Judgment for the defendant.

The plaintiffs appealed.

1880. April 13, 17. *Morgan Lloyd, Q.C.*, and *W. R. Phillips*, for the plaintiffs.

J. Brown, Q.C., and *Jelf, Q.C.*, for the defendant.

(1) 8 Mod. 318. (2) 2 H. & N. 858.

The arguments are sufficiently noticed in the judgments. The following authorities were cited: *Andrews* v. *Paradise* (1); *Shaw* v. *Stenton* (2); *Calvert* v. *Sebright.* (3)

BRETT, L.J. I think that the judgment of Field, J., must be affirmed.

It has been argued that a breach of the covenant for quiet enjoyment has been committed. But I think that the covenant is prospective in its operation. The defendant covenants that from the time of granting the lease the plaintiffs' enjoyment of the premises demised to them shall not be obstructed by any act of either the defendant or of any one for whom he is responsible. But the only act done by the defendant was done before the lease was granted to the plaintiffs. The jury have found in the defendant's favour that the act was not done negligently. After the lease had been granted, there was no breach of any duty, there was no act of either commission or omission and no negligence. What happened, was the result of the forces of nature. The covenant being prospective, no breach of it was committed.

In the cases which have been cited to us, an authority to do an act had been given by the lessor before the granting of the lease, and afterwards an act had been done pursuant to that authority; that is to say an act had been committed by some person authorized by the prior authority of the lessor to do it, which had diminished the tenant's enjoyment of the premises demised to him. In these cases, although the authority had been given before the lease, the act had been done after it; it was, therefore, an act for which the lessor was responsible, he having conferred the authority to do it, and the act was done during the enjoyment by the lessee. No decision can be found to maintain the view urged on behalf of the plaintiffs; it is not supported by either principle or authority.

It was further suggested that the plaintiffs have a cause of action, irrespective of the covenant for quiet enjoyment. Reliance has been placed upon *Rylands* v. *Fletcher.* (4) The principle of

(1) 8 Mod. 318.
(2) 2 H. & N. 858, at pp. 863, 864, per Pollock, C.B.
(3) 15 Beav. 156.
(4) Law Rep. 3 H. L. 330.

1880

ANDERSON v. OPPENHEIMER.

that case might have applied, if the supply of water had been for the use of the other tenants without reference to the plaintiffs' portion of the premises. But this apparatus was used for the common benefit of the plaintiffs and the other tenants. There was no storing up of water for the benefit of the defendant alone. I think, therefore, that the plaintiffs cannot succeed upon this ground.

COTTON, L.J. The action has been brought for the breach of a covenant for the quiet enjoyment of premises let by the defendant to the plaintiffs. It may be assumed for the purposes of this case that the plaintiffs' enjoyment was substantially interrupted, and the question is whether that has been done by the defendant or those lawfully claiming through him. In my opinion the words of the covenant only refer to acts done after the lease has been granted. It is conceded that no act was done by the defendant, or those lawfully claiming through him, after the lease was granted. I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant; but in the present case there was no act of either commission or omission; and the jury have found that there was no negligence on the part of any one in the fixing and maintaining the pipe; therefore, although the plaintiffs' enjoyment was interrupted, there was nothing to make what occurred fall within the covenant.

It was suggested that the case comes within *Rylands* v. *Fletcher* (1); that the defendant, having the water in the cistern at the top of the house for his own purposes, is liable if, without negligence, it escaped and injured the plaintiffs. I agree with Brett, L.J., that the water having been stored in the cistern for the benefit of the plaintiffs as well as of the other tenants, the case does not come within *Rylands* v. *Fletcher* (1), although the spot where the water escaped was not on the plaintiffs' premises.

THESIGER, L.J. I am of the same opinion. If the apparatus for storing and distributing the water had been entirely unconnected with the plaintiffs' premises, the matter might have worn

(1) Law Rep. 3 H. L. 330.

1880

ANDERSON v. OPPENHEIMER.

a different aspect. It might have been urged that the defendant, having stored up water for his own purposes, is liable upon the principle of *Rylands* v. *Fletcher* (1), for the escape of the water which did damage to the plaintiffs. A liability might also have attached under the covenant. But the facts do not admit of this construction. The plaintiffs took the premises subject to the circumstance, that there was an apparatus for the supply of the whole house with water, and that there were a main pipe from the cistern and branch pipes to each of the floors. They took the lease upon this footing, and they would have been entitled to complain if the supply of water failed. They took the benefit and must take the burden. The defendant is not liable upon either the principle of *Rylands* v. *Fletcher* (1) or upon the words of the covenant.

Judgment affirmed.

Solicitor for plaintiffs: *C. T. Foster.*

Solicitors for defendant: *Pilgrim & Phillips.*

[IN THE COURT OF APPEAL.]

Aug. 5.

BARKER & Co. *v.* HEMMING AND ANOTHER.

Practice—Costs—Taxation—Set-off—Separate Proceeding between same Parties.

Under Order VI., rule 19 of the Rules of the Supreme Court (Costs)—by which, whenever, in cases specified, a party entitled to receive costs is liable to pay costs to the other party, the taxing officer may adjust the costs by way of deduction or set-off—such set-off or deduction is limited to costs due to either party in respect of the same action, and cannot be enforced in respect of the costs of any separate proceeding between the same parties.

The plaintiffs having recovered judgment against two defendants the judgment was set aside as against one defendant with costs. The same defendant having claimed goods taken in execution by the plaintiffs under the same judgment, the sheriff interpleaded, and an order was made barring the claim with costs to be paid to the plaintiffs:—

Held, that the master in taxing the costs of such defendant could not order the costs payable by him under the interpleader proceedings to be set off against the costs due to him in the original action from the plaintiffs.

MOTION to rescind an order of Lindley, J., in chambers, refusing to review the master's taxation of costs.

(1) Law Rep. 3 H. L. 330.

1880

BARKER v. HEMMING.

It appeared that the action was brought against the defendants Hemming and Johnson upon a bill drawn by Johnson and accepted by Hemming. An appearance for both defendants was entered by the same solicitor, and in October, 1879, judgment was signed against both defendants, no defence having been delivered. The plaintiffs then issued execution againt the defendant Johnson, and certain goods in his house having been seized the defendant Hemming claimed them, and the sheriff interpleaded. Hemming also applied in the action to have the judgment set aside as against him, on the ground that the writ had never been served upon him, and that he had not retained Johnson's solicitor to act for him. The plaintiffs thereupon discontinued the action as against Hemming, and he signed judgment for his costs. Hemming's claim under the interpleader came before Field, J., at chambers, who made an order barring the claim with costs.

In taxing the costs the master allowed the costs to which Hemming was entitled as successful defendant to be set off as against the costs which he was liable to pay in the interpleader proceedings.

Gore, for the defendant Hemming, in support of the motion. The two bills of costs were not incurred in the same action, and no set-off ought to have been allowed. They are not interlocutory costs within Rule 63 of Hilary Term, 1853. But the rule which governs the question is Rule 19 of the Rules of the Supreme Court (Costs) (1). The interpleader proceedings were not part of the original action, and the defendant might have conducted them through a different solicitor.

(1) By the Rules of the Supreme Court (Costs), Order VI., rule 19: "In any case in which under the preceding rule, No. 18, or any other rule of court, or by the order or direction of a Court or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing master may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay."

By Rules of Hilary Term, 1853, 63, "No set-off of damages, or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

J. W. Mellor, Q.C., and *P. Baylis*, for the plaintiffs. The goods claimed in the interpleader proceedings were in the custody of the sheriff in the original action.

PER CURIAM (Cockburn, C.J., and Bowen, J.). The appeal must be allowed and the taxation reviewed. The interpleader is not part of the original action, but something wholly collateral to it.

The plaintiffs appealed.

August 5. *Bompas, Q.C.*, and *P. Baylis*, for the plaintiffs. Hemming is a party to the action, and the interpleader proceedings are intituled in the action. The case, therefore, comes within the words of Order VI., rule 19, and also within its object; it was intended to prevent such injustice as arises in a case of bankruptcy if a party is to pay costs to the trustee, and only get a dividend on the costs coming to himself. It was decided in *Pringle* v. *Gloag* (1) that the attorney's lien will not be allowed to affect the rights of the parties.

Gore, for the defendant Hemming, was not called upon.

JAMES, L.J. The plain meaning of Order VI., rule 19, is that costs are to be set-off as between parties—not as between persons, but as between parties—in the same action, and in their character of parties to it. It cannot be supposed that the rule would apply to costs incurred by them in a distinct action in a different branch of the court, and it can just as little apply to the costs incurred in this interpleader, which is a proceeding distinct from the action. It is true that the proceedings are intituled in the action, but that is merely a convenient mode of identifying them: it would be more correct to intitule them in the matter of the execution. They are distinct from the action, and it is a mere accident that Hemming, a party to these proceedings, is also a party to the original action. I am of opinion that the rule has no application to the case, and that the appeal must be dismissed.

BRETT, L.J. I agree that Rule 19 has no application. It

(1) 10 Ch. D. 676.

1880

BARKER v. HEMMING.

provides that where under certain circumstances a party is liable to pay costs to another party, and also entitled to receive costs from him, there shall be a set-off. This, in my opinion, applies only to costs incurred in the same action. Are the costs in the present case incurred in the same action or in distinct actions? The interpleader proceedings are as distinct in point of law from the original action as any other action could be. If then the rule does not apply, the master had no jurisdiction to act otherwise than he would act under judgments in two distinct actions: he was bound to tax the costs separately and could not give a single allocatur. Our decision does not at all interfere with the old jurisdiction of the Court to order judgments for costs in different actions to be set off against each other. In the present case the Court has not exercised that jurisdiction.

COTTON, L.J. All we have to consider in this case is whether the master had jurisdiction to make a single allocatur. This depends on the construction of Order VI., rule 19. When that rule speaks of a party being liable to pay costs to any other party, i.e., of a defendant or plaintiff being liable to pay costs to a plaintiff or defendant, it must mean to the person who is plaintiff or defendant in that same action. Does it then apply to all costs payable to that party by the opposite party, whether incurred in the same action or not? I think that it cannot apply to costs in distinct proceedings, but must be limited to cases where the party who is entitled to receive costs is also liable to pay costs to the other party, in respect of matters arising in the action between the same parties in their character of parties to the action, and that it does not apply to costs of a separate proceeding between them. In the present case the interpleader proceedings were between the plaintiffs and Hemming, who happened to be a defendant to the action, but he was not a party to them in that capacity. I am of opinion, therefore, that the decision of the Queen's Bench Division is right.

Order of Queen's Bench Division affirmed.

Solicitors for plaintiffs: *Harper, Broad, & Battcock.*
Solicitors for defendant: *Wordsworth, Blake, & Co.*

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1 App. Cas.

INDEX.

ABATEMENT—Criminal proceedings—Death of complainant - - - - - **336**
See CRIMINAL LAW—PROCEDURE.

ADULTERATION—*Sale of Food and Drugs Act* (38 & 39 *Vict. c.* 63), *ss.* 13, 20—*Purchase of, Sample for Analysis—Procedure—Officer acting by Deputy.*] Under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), which by s. 13 enables an inspector of nuisances or any one of other specified officers to procure a sample of food or drugs, and if he suspect it to be sold to him contrary to the Act to submit it for analysis to the district analyst, and by s. 20 enables the person causing the analysis to be made to take proceedings for the recovery of the penalty imposed for such offence, it is not necessary that the officer taking such proceedings should have acted personally in the purchase of the sample, and the person purchasing the sample on his behalf need not himself deliver the sample to the analyst, but may hand it to another for the purpose of such delivery. HORDER *v.* SCOTT - - - **552**

AMENDMENT—Order of justices - - **126**
See BASTARDY. 2.

APPEAL—County Court—Judge's notes - **359**
See PRACTICE. 11.

—— Interlocutory order or judgment - **368**
See PRACTICE. 4.

—— Supreme Court — Judge in chambers — Appeal to High Court - - **267**
See PRACTICE.

—— Supreme Court—Order in chambers—When out of time - - - - **65**
See PRACTICE. 13.

—— Supreme Court—Rule for certiorari - **95**
See PRACTICE. 3.

BANKRUPTCY—*Disclaimer of Leasehold Interest —Leave of Court—Application to Trustee to Disclaim—Service of, by Post—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24—*Bankruptcy Rules*, 1870, *rule* 14—*Bankruptcy Rules*, 1871, *rule* 28.] The 28th rule of the Bankruptcy Rules, 1871, provides that when any property of a bankrupt acquired by a trustee in bankruptcy shall consist of a leasehold interest, the trustee shall not execute a disclaimer without the leave of the Court :—*Held*, that the effect of the rule was to make it the duty of the trustee as between himself and the Court of Bankruptcy to obtain the leave of the Court before disclaiming a tenancy, but that it did not render the disclaimer inoperative as between the landlord and the trustee where no such leave had been obtained.—The mere posting of an application to the trustee in bankruptcy requiring him to decide whether he will disclaim or not is not sufficient under the 24th section of the Bankruptcy Act, 1869, but such application must be received in order that the time for disclaimer may be limited in accordance with the section :—*Semble*, that the application would be received within the section if delivered through the post at the office of the trustee to the person there in charge. REED *v.* HARVEY - - - - - **184**

BANKRUPTCY—*continued.*

2. —— *Liquidation by Arrangement—Omission of Creditor's Name from Statement of Debts—Discharge of Debtor—Fraud—Evidence.*] A certificate of discharge, obtained by a debtor who has filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, is a defence to an action by a creditor whose name has been fraudulently omitted by the debtor from the list of creditors delivered to the registrar, the only remedy of such creditor being to apply to the Court of Bankruptcy to vacate the registration and cancel the certificate. WADSWORTH *v.* PICKLES - **470**

3. —— *Secured Creditor—Omission to value Security—Lapsed Policy of Life Insurance—Discharge of Surety.*] The defendant became surety for the repayment of a sum of money advanced by the plaintiff to P. Under the terms of the contract of suretyship P. deposited with the plaintiff a policy of insurance on his life by way of collateral security. P. failed to pay the premiums on the policy, which in consequence lapsed. Subsequently to the expiry of the policy

BANKRUPTCY—*continued.*

P. became bankrupt, and the plaintiff proved against P.'s estate for the whole amount of the debt due to her, without putting any value on the policy, which was consequently ordered by the Court of Bankruptcy to be delivered up to the trustee.—The question was whether the plaintiff, by adopting that course, had discharged the defendant from his liability as surety:—*Held*, affirming the decision of Manisty, J., that she had not, and for two reasons: first, that the defendant's position had not been altered by the surrender of the policy to the trustee, for, having lapsed, it was a mere piece of waste paper of no marketable value whatever; and, secondly, that, even assuming it had some value, and could, therefore, be said to be a security, the plaintiff was none the less entitled to exercise the option given by the Bankruptcy Act of surrendering the security to the trustee and proving for the whole debt, because there happened to be a surety for the payment of that debt. Rainbow *v.* Juggins
Q. B. D. 138; C. A. 422

—— Composition—Invalid resolution - 359
See Practice. 11.

—— Infant—Trade debts - - - 28
See Criminal Law—Debtors Act.

BASTARDY—*Appeal—Order of Quarter Sessions when final—Hearing in absence of Respondent—Decision "on Merits."*] Upon the hearing of an appeal to quarter sessions against an order of affiliation, it appeared that the respondent and her witnesses were not present, having mistaken the day of hearing, and her counsel applied for an adjournment till the following morning, offering to pay the costs of the day. The appellant having declined to accede to this proposal, the sessions directed the case to proceed, and quashed the order, no evidence having been adduced on the part of the respondent:—*Held*, that the order of quarter sessions was not a decision upon the merits, and that fresh proceedings in respect of the same matter might be taken before justices. The Queen *v.* May - - - - 382

2. —— *Order for Maintenance—Omission to provide for Education of Child—*35 & 36 *Vict. c.* 65, *s.* 4*—Order to take effect from Date of Application.*] By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4, justices may make an order on the putative father of a bastard child for the payment to the mother of a sum of money weekly "for the maintenance and education of the child; . . . and if the application be made . . . within two calendar months after the birth of the child, such weekly sum may, if the justices think fit, be calculated from the birth of the child:"—*Held*, that an order of maintenance made under the above Act, but which was in the form in the schedule to 8 & 9 Vict. c. 10, directing the payment to be made to the mother, without any provision for its application to the maintenance and education of the child, was invalid, and must be quashed.—*Semble*, that an order of maintenance under 35 & 36 Vict. c. 65, s. 4, may be made so as to operate from the date of the application for a summons. The Queen *v.* Padbury - 126

BICYCLE—Liability to toll - - - 175
See Highway. 2.

BILL OF LADING—Exemption of shipowner from liability—General average - 38
See Ship.

—— Title of first indorsee—Production of unindorsed copy - - - 129
See Sale of Goods.

BILL OF SALE—*Implied License for Grantor to carry on Business and dispose of Goods—Liability of Purchaser.*] Claim. That plaintiffs were holders of a bill of sale duly registered, comprising amongst other things all the growing crops and all the goods, chattels, and effects which then were or thereafter should be on or about the farm and premises of S., farmer, and that defendant wrongfully deprived the plaintiffs of the use and possession of twelve quarters of wheat comprised in the bill of sale.—Defence. That the plaintiffs suffered S. to have the possession of the goods, and to hold himself out as having not only the possession but the property in them, and that he sold the same to the defendant, who bought them in the ordinary course of business, and without any notice that they did not belong to S. That S. was suffered by the plaintiffs to carry on his business as a farmer and dealer in grain at the time of the sale, and it was the ordinary course of business of S. in such business to make such sales:—*Held*, that the defence was good, for the bill of sale by implication conferred a license on the grantor to carry on his business and dispose of the goods so as to give a valid title to purchasers. National Mercantile Bank *v.* Hampson - - - - - 177

2. —— *Payment by Instalments—Default—Giving Time—Waiver*] The plaintiff gave the defendant a bill of sale on his goods as security for money advanced. The loan was to be repaid by instalments, and the bill of sale authorized the defendant at any time after the execution thereof to take and retain possession of all the goods comprised in it until all the money payable under it should have been satisfied. It also contained a power of sale. The plaintiff, having paid thirteen instalments, on the day when the fourteenth became due called upon the defendant and asked for time; the defendant replied that he would wait for a week, but he seized the goods upon the third day and sold them before any further default had been committed by the plaintiff. An action having been brought to recover damages for the seizure and sale, at the trial the judge asked the jury whether the defendant had so acted as to induce the plaintiff to believe that the defendant would hold his hand; the jury answered this question in favour of the plaintiff:—*Held*, that there was no evidence of a waiver by the defendant, and that there must be a new trial.—*Quære*, whether *Albert* v. *Grosvenor Investment Co.* (Law Rep. 3 Q. B. 123) was correctly decided. Williams *v.* Stern - C. A. 409

BOND—*Loan payable by Instalments—Balance payable upon Default in payment of one Instalment—Interest and Expenses of Life Insurance—Penalty—Relief of Debtor.*] The plaintiffs lent money to S. upon his bond, under which the principal was to be paid in five years by instalments, in case the debtor should so long live, the instalments being calculated so as to cover the

BOND—*continued.*
principal of the loan, interest thereon, the expenses of negotiating it, and a margin representing a premium for the insurance of the debtor's life. The condition of the bond made it void; first, if the instalments were regularly paid till the expiration of the five years, or till the death of the debtor, whichever should first happen; secondly, if all the instalments which would have become payable at the expiration of the five years, if the debtor lived so long, were at any time paid up, the balance of inslalments being at once payable on the failure of any single instalment. The defendant as surety executed the bond, and default having been made in payment of one instalment, the plaintiffs brought an action claiming the entire balance of unpaid instalments:—*Held* (reversing the judgment of Bowen, J.), that the amount claimed was not a penalty and could be recovered. Protector Endowment, Loan Company *v.* Grice - - **Q. B. D. 121; C. A. 592**

BURIAL ACTS—18 *&* 19 *Vict. c.* 128, *s.* 18—*Expenses of repairing Burial Ground closed by Order in Council.*] The churchyard of the parish of W. having become insufficient for the purposes of burial, a detached piece of land was in 1838 conveyed to the commissioners under the Church Building Acts as an addition to it. The parish of W. consisted of the township of W. and five other townships, each of these six townships having separate overseers and a separate poor-rate. The above piece of land, which was situate in the township of W., was used as the burial ground for the whole parish until 1854, when it was closed by Order in Council, and a burial board for the township of W. was formed:—*Held*, that, under 18 & 19 Vict. c. 128, s. 18, where a burial ground is closed by Order in Council, if it is a churchyard it must be kept in order by the churchwardens, and if it be a cemetery formed by a burial board, then by the burial board; and that therefore the ground in question, being a churchyard, was to be kept in order, not by the burial board, but by the churchwardens:—*Held*, also, that the expenses of keeping the ground in order were to be repaid to the churchwardens out of the rate for the township of W., being a place having a separate poor-rate within which the ground was situate, and not out of the rates of all the townships composing the parish of which it had been the burial ground. The Queen *v.* Burial Board of Bishop Wearmouth **C. A. 67**

BY-LAW — *Railway Company — Ultrâ vires — Unreasonableness of Penalty—Passenger refusing to shew Ticket—Penalty varying with Distance Train has travelled—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 108, 109.] A by-law of the respondents' company provided "that a passenger should shew and deliver up his ticket to any duly authorized servant of the company whenever required to do so for any purpose, and that any person travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid should be required to pay the fare from the station whence the train originally started to the end of his journey." The appellant had a ticket entitling him to travel on the lines of the respondents and the L. and S. W.

BY-LAW—*continued.*
Railway Company from Charing Cross or Cannon Street to Windsor and back. Having come to the Waterloo Junction station on the respondents' line, where he had to change trains, he had for this purpose to go from the respondents' station to that of the L. and S. W. Railway Company. On passing out of the respondents' station he was asked to shew his ticket but refused to do so. There was no intention to defraud on the appellant's part. The respondents summoned him under the above by-law, and he was convicted in the amount of the fare from the station whence the respondents' train by which he travelled had started:—*Held*, that the conviction must be quashed. —By Cockburn, C.J., assuming that the power given by the 108th section of the Railways Clauses Consolidation Act, to make by-laws for "regulating the travelling upon or using and working the railway," applied to persons travelling in the company's carriages, which he was inclined to think it did not, it was not competent to the company by their by-law to make the refusal to shew the ticket an offence in the absence of a fraudulent intention; secondly, the by-law was void for unreasonableness, because the penalties thereunder for offences of equal criminality would vary with the distances from which the train might originally have started; and thirdly, the by-law was inapplicable to the case, as the power to make by-laws was confined to the case of persons travelling on the railway, which the appellant was not doing when required to shew his ticket.—By Lush, J.: The by-law was void for unreasonableness, because the penalty for not shewing the ticket varied according to the distance the train had travelled, and also because the passenger was required not only to shew but to deliver up his ticket whenever required for any purpose. Saunders *v.* South Eastern Railway Company **456**

2. —— *Validity—Regulation for the preservation of Order on a Metropolitan Common—Public Meetings, Restriction on—Metropolitan Commons Act*, 1866 (29 *&* 30 *Vict. c.* 122), *s.* 6.] By a scheme made under the Metropolitan Commons Act, 1866, and confirmed by the Metropolitan Commons Supplemental Act, 1877, it was provided that a common should be dedicated to the use and recreation of the public as an open and unenclosed space for ever, and the Metropolitan Board of Works were empowered to frame by-laws and regulations for the prevention of nuisances and the preservation of order on the common. The Metropolitan Board of Works made a by-law prohibiting the delivery of any public speech, lecture, sermon, or address of any kind, except with the written permission of the board first obtained, and upon such portions of the common and at such times as might be by such written permission directed and sanctioned by the board:—*Held*, that such by-law was valid. —No right on the part of the general public to hold meetings on a common is known to the law. De Morgan *v.* Metropolitan Board of Works [155

CARRIER — Goods destroyed by fire — Warehousing - - - - - **278**
See Railway.

CASES—*Albert* v. *Grosvenor Investment Co.* (Law Rep. 3 Q. B. 123) doubted - 409
See Bill of Sale. 2.
—— *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 598) discussed - - - - 414
See Principal and Agent.
—— *Beckett* v. *Bradley* (31 L. J. (Q.B.) 65) not followed - - - - 159
See Mine.
—— *Bryne & Co.* v. *Leon van Tienhoven & Co.* (49 L. J. (C.P.) 316) followed - 346
See Contract.
—— *Cooke* v. *Oxley* (3 T. R. 653) discussed 346
See Contract.
—— *Chatfield* v. *Sedgwick* (4 C. P. D. 459) discussed - - - - 569
See Practice.
—— *Dunn's Case* (1 Lea. C. C. 59) followed 34
See Criminal Law—Forgery.
—— *Howell* v. *London Dock Co.* (8 E. & B. 212) commented upon - - - 89
See Metropolis Management Act.
—— *Heald* v. *Kenworthy* (10 Ex. 739; 24 L. J. (N.S.) 76) followed - - 414
See Principal and Agent.
—— *Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 117) approved of - - 394
See Husband and Wife.
—— *Little's Case* (8 Ch. D. 806) distinguished
See Practice. 4. [368
—— *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (5 Ch. D. 569) followed 560
See Insurance (Fire).
—— *Rylands* v. *Fletcher* (Law Rep. 3 H. L. 330) distinguished - - - 602
See Landlord and Tenant.
—— *Staples* v. *Young* (2 Ex. D. 324) questioned
See Practice. [569
CATTLE PLAGUE—Foreign animals slaughtered at sea—Compensation - - 325
See Contagious Diseases (Animals) Act.
CERTIORARI—Application to quash inquisition—Matter not legally subject of—Compensation - - - - 179
See Lands Clauses Act.
CERTIORARI, RULE FOR—Appeal from—High Court of Justice - - - 95
See Practice. 3.
CHEQUE—Signed in fictitious name - 34
See Criminal Law—Forgery.
COMMISSION—To take evidence—Secondary evidence of written documents - 26
See Evidence.
COMMON—Metropolis—By-law - - 155
See By-Law. 2.

COMPANY—*Agreement signed by Directors, and not sealed with Company's Seal—Liability of Directors—Misrepresentation of Authority.*] By the articles of association of the T. Company, Limited, the directors, with the sanction of the company in general meeting, were empowered to borrow money on mortgage of the company's lands or upon debentures, bonds, promissory notes, bills of exchange, and other transferable securities, or

COMPANY—*continued.*

otherwise, as they should deem requisite for carrying on the works, &c. The plaintiff having been requested by the defendants, who were three of the directors of the company to advance money to the company, agreed to advance 500*l.* upon having an agreement signed by the defendants to pay the 500*l.* and interest at the end of six months upon the security of the machinery and tools of the company. The following agreement was afterwards written out and signed by the defendants and the plaintiff: "Agreement between the T. Company of the one part, and W. M. [plaintiff] on the other part. In consideration for the advance of 500*l.* paid by the said W. M. to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.* with interest in six calendar months from this date hereof. And we do hereby assign to the said W. M., as security for the said advance of 500*l.*, the machines and tools, as invoiced to him 3rd June, 1878 . . ."—This document was not sealed with the seal of the company nor countersigned by the secretary, pursuant to the articles of association, nor did the defendants express that they signed on behalf of the company. The plaintiff, upon default in repayment of the loan at the expiration of six months, took possession of the machinery and tools, upon which the company obtained an injunction in the Chancery Division restraining him from dealing with the machinery, on the ground that the directors were not authorized to make the alleged assignment:—*Held*, by Lush, J., first, that the defendants were personally liable for the repayment of the 500*l.*, notwithstanding the heading of the agreement, which must be rejected, since the agreement was not signed in a form binding on the company; secondly, that they were not liable for damages sustained by the plaintiff in respect of the proceedings for the injunction, as the agreement did not profess to be an assignment by the company, but only by the defendants as directors, and was therefore no representation by them that they had the authority of the company to assign its property. McCollin *v.* Gilpin - - 390

2. —— *Director — Shareholder — Contract — Trust.*] A company had been formed for the purpose of receiving money from depositors and investing it upon security. The defendants were directors of the company. The plaintiff deposited with the company the sum of 1000*l.* upon the terms that it should remain in their hands for five years, that they should meanwhile pay him interest at the rate of 6 per cent., that by way of security they should transfer to him a mortgage made to them, and that if the mortgage should become ineffective before the expiration of the five years they would replace it by another. The mortgage, upon which the 1000*l.* belonging to the plaintiff was secured, was paid off before the expiration of the five years, but the company did not replace it by another, and dealt with the proceeds as part of the funds of the company. The company ultimately went into liquidation, and the plaintiff then sued the defendants to recover from them the sum of 1000*l.* paid by him to the company, on the ground that it was lost to him by reason of the defendants' gross negligence. At the trial it

COMPANY—*continued.*

was proposed to shew that at the time when the mortgage securing the plaintiff's 1000*l.* was paid off, the company was insolvent: the judge rejected the evidence, directed the jury to find for the defendants, and entered judgment for them: —*Held*, per Bramwell and Brett, L.JJ. (Baggallay, L.J., dissenting), that the ruling of the judge at the trial was right, and that the judgment must be affirmed.—By Bramwell, L.J., that if a trust had been created between the plaintiff and the company, the defendants, as directors, could not be held personally responsible for a breach of it. —By Brett, L.J., that a contract, and not a trust, existed between the plaintiff and the company, and that the defendants could not be held liable as constructive trustees for aiding and abetting in the breach of a trust.—By Baggallay, L.J., that the relation of trustee and cestui que trust existed between the company and the plaintiff, that a breach of trust had been committed by the company, that the defendants were parties to the breach of trust, and that the evidence rejected at the trial ought to have been admitted, as it tended to shew whether the defendants had derived any personal benefit from the breach of trust. Wilson *v.* Lord Bury - - - - **C. A. 518**

3. —— *Forged Transfer of Stock—Certificate of Registration—Estoppel.*] C. owned stock in a company incorporated under the Companies Act, 1862. His clerk, P., contracted to sell stock in the company to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the company for registration. The company sent a letter to C. inquiring whether the transfer was correct: as they received no answer from him, they registered the transfer. B. borrowed money from a bank, and by way of security for the loan the stock was transferred by S. at the request of B. to I. as trustee for the bank, and the company registered I. as owner and issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, and the stock was held by I. as a bare trustee for B. The forgery was discovered, and the company then refused to acknowledge I. as the holder of the stock. In an action brought by B. and I. to compel the company to recognise their title:—*Held*, that although I., as trustee for the bank, might have acquired a good title by estoppel against the company, yet that title ceased when the loan by the bank was paid off, and that no estoppel existed in favour of B. against the company; for B. in contracting, through S., to buy the stock belonging to C. had acted on the faith of the forged transfer, and had not relied upon any act of the company, and by sending the forged transfer to the company had induced them to recognise his nominee as the holder, and that the action would not lie.—*In re Bahia and San Francisco Ry. Co.* (Law Rep. 3 Q. B. 584); *Hart* v. *Frontino, &c., Gold Mining Co.* (Law Rep. 5 Ex. 111); and *Knights* v. *Wiffen* (Law Rep. 5 Q. B. 660) discussed. Simm *v.* Anglo-American Telegraph Company. Anglo-American Telegraph Company *v.* Spurling - - - **C. A. 188**

4. —— *Promoter—Fiduciary Relation—Secret Profit made by Promoter—Right of Company to enforce Agreement made in favour of Promoter.*] G. had purchased certain calico printing works for the sum of 15,000*l.* G. and S. associated themselves together as promoters of a company formed for the purchase of the works from G., and for the purposes of the negotiations for such purchase a contract, which the jury found to be a sham contract, was entered into between them for the pretended sale of the works by G. to S. for 20,000*l.* The company was ultimately formed, its directors being nominees of G. and S., and the works were conveyed by G. and S. to the company for 20,000*l.* It was agreed between G. and S. that G. should pay the sum of 3000*l.* out of the purchase-money to S., but this agreement was not communicated to the directors of the company when the sale to the company was effected:—*Held*, by Bowen, J., on further consideration, that S., as a promoter of the company, was not entitled to secure any profit to himself out of the formation of the company without the knowledge of the directors, and that such being the case the company were entitled to treat the agreement made between G. and S. as made by S. on their behalf, and to enforce it against G., and that consequently they could recover from G. so much of the 3000*l.* which he had agreed to pay to S. as remained unpaid. Whaley Bridge Calico Printing Company *v.* Green - - - - - **109**

5. —— *Voluntary Winding-up—Assignee of Company—Contract, how far Personal—Agreement to repair—Companies Act*, 1862, *ss.* 95, 131.] The plaintiffs, a waggon company, by agreement in writing let the defendants a number of railway waggons for a term of years at an annual rent, the agreement providing that the plaintiffs, their executors or administrators, should during the term keep the waggons in repair. Pending the agreement an order was made for the winding-up of the plaintiff company under the supervision of the Court, in pursuance of a resolution previously passed by the company, and liquidators were appointed, who joined the company in assigning the benefit of the contract to another company, upon the terms that such company should perform the stipulations by the assignors contained in the original contract. The assignees took over the repairing stations of the plaintiffs and the staff of workmen employed by them, and were always ready and willing to execute all necessary repairs to the waggons:—*Held*, that the defendants had no defence to an action for rent, upon the ground that the plaintiffs had incapacitated themselves from performing their contract; for, first, the voluntary liquidation of the company was immaterial, the liquidators having power under the Companies Act, 1862, ss. 95, 131, to continue the letting of the waggons; and, secondly, the repair of the waggons by the company to whom the contract was assigned was a sufficient performance by the plaintiffs of their agreement to repair. British Waggon Company *v.* Lea - - - **149**

CONTAGIOUS DISEASES (ANIMALS) ACT—(32 & 33 *Vict. c.* 70), *ss.* 65, 66, 67, 68, 69—*Foreign Animals slaughtered at Sea—Right to Compensation—Local Authority—Jurisdiction.*] Under the Contagious Diseases (Animals) Act, 32 & 33 Vict. c. 70, no compensation is payable by local

CONTAGIOUS DISEASES (ANIMALS) ACT—*cont.* authorities in respect of foreign animals slaughtered after their arrival, but before being landed at a British port; for compensation is only payable where animals have been slaughtered in pursuance of the Act, and the Act does not authorize local authorities to order such animals to be slaughtered. Nissler *v.* Corporation of Hull - - - - - - - 325

CONTRACT—*Sale of Goods—Offer, till when open—Refusal of Offer, what amounts to—Revocation of Offer, when effective.*] The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40*s.* per ton, nett cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 P.M. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 P.M. found a purchaser for the iron, sent a telegram at 1.34 P.M. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent.—The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiffs' telegram was sent at 9.42 A.M. how prices would range during the day:—*Held*, by Lush, J., that under the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that, although the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable.—*Cooke* v. *Oxley* (3 T. R. 653) discussed.—*Bryne & Co.* v. *Leon van Tienhoven & Co.* (49 L. J. (C.P.) 316) followed. Stevenson *v.* McLean - - - 346

—— How far personal - - - 149
See Company. 5.

CORPORATION—Liability to penalties—Chemist and Druggist - - - 310
See Pharmacy Act.

COSTS—Action for more than 50*l.*—Counter-claim—Judgment on balance for plaintiff for 15*l.* - - - - - 569
See Practice. 5.

—— Of appeal—Taxation before termination of action - - - - 60
See Practice. 9.

COSTS—*continued.*

—— Higher scale—Injunction - 167, 431
See Practice. 6.

—— Parties brought in under Order XVI. 268
See Practice 7.

—— Taxation — Set-off — Separate proceeding between same parties - - 609
See Practice. 10.

—— Security for — Defendant counter-claiming upon same matters as plaintiff's claim
See Practice. 8. [144

COUNTY COURT—Appeal—Omission to request judge to take note - - - 359
See Practice. 11.

COUNTY RATE—Expenses of conveying to prison
See Prison. [170

COVENANT—For quiet enjoyment—Bursting of water pipe - - - - 602
See Landlord and Tenant.

CRIMINAL LAW—*Abortion, attempt to procure—Noxious Thing*—24 & 25 *Vict. c.* 100, *s.* 58.] The prisoner was convicted, under 24 & 25 Vict. c. 100, s. 58, of having feloniously and unlawfully caused to be taken by E. V. a certain "noxious thing," to wit, half an ounce of oil of juniper, with intent to procure the miscarriage of the said E. V.—It was proved that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without any bad effect, but that a half ounce produces ill effects, and is to a pregnant woman dangerous. The question reserved was whether there was evidence that the half ounce of oil of juniper was a "noxious thing" within the statute.—*Held*, by the Court (Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Stephen, JJ.), that there was evidence that it was a "noxious thing" within the statute, and that the conviction was right. The Queen *v.* Cramp - C. C. R. 307

2. —— *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 12—*Infants Relief Act*, 1874 (37 & 38 *Vict. c.* 62), *s.* 1—*Bankruptcy—Infant.*] W. was convicted under s. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for that he, within four months before the presentation of a bankruptcy petition against him upon which he was adjudged bankrupt, quitted England, taking with him, with intent to defraud, property exceeding 20*l.*, which ought by law to have been divided amongst his creditors.—At the times when he quitted England and when he was adjudged bankrupt W. was an infant. The debts proved against his estate in the bankruptcy were trade debts, contracted since the passing of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), and it did not appear that any debts for necessaries supplied to him existed:—*Held*, by Cockburn, C.J., Huddleston, B., Lindley, Manisty, and Hawkins, JJ., that the conviction could not be upheld. The Queen *v.* Wilson [C. C. R. 28

3. —— *Forgery—Cheque signed in fictitious Name.*] The prisoner, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin in the presence of the prosecutor upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own cheque

CRIMINAL LAW—*continued.*

drawn in his own name. At the time he drew the cheque the prisoner knew that it would be, as in fact it was, dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name:—*Held*, by Cockburn, C.J., Lush, J., Huddleston, B., Lindley and Hawkins, JJ., that the prisoner was not guilty of the offence of forgery.—The resolution in *Dunn's Case* (1 Lea. C. C. 59): "In all forgeries the instrument supposed to be forged must be a false instrument in itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person," followed and approved. The Queen *v.* Martin [C. C. R. 34

4. —— *Justices, Jurisdiction of, upon preliminary Inquiry into criminal Charge—Evidence—Libel, Truth of, not a Subject of Inquiry before Magistrate*—6 *&* 7 *Vict. c.* 96, *ss.* 4, 5, 6.] Upon an information for maliciously publishing a defamatory libel under the 5th section of 6 & 7 Vict. c. 96, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, and a defence based upon the truth of the libel under section 6 of the Act can only be inquired into at the trial upon a special plea framed in accordance with the terms of that section. —The province of a magistrate upon a preliminary inquiry into a charge of an indictable offence discussed. The Queen *v.* Carden - - 1

5. —— *Justices, Jurisdiction of—Warrant of Commitment — Backing of Warrant — Police, County—Police, Borough—Arrest—Constable—Assault on Constable*—5 *&* 6 *Wm.* 4, *c.* 76, *ss.* 76, 101; 19 *&* 20 *Vict. c.* 69, *s.* 6; 11 *&* 12 *Vict. c.* 43, *s.* 3.] C. was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine, but not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. C. was not pursued from the county, but found in the city:—*Held*, by the Court (Lord Coleridge, C.J., Pollock, B., Field and Stephen, JJ.), that the conviction was wrong, that the constables were not acting in the execution of their duty in so executing such warrant. The Queen *v.* Cumpton - C. C. R. 341

6. —— *Lunatic—Lunatics, Reception of, in Unlicensed House—Honest Belief—Mens rea*—8 *&* 9 *Vict. c.* 100, *s.* 44.] The defendant was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the above Act, or under any previous Act, but it was specially found by the jury who convicted, that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic:—*Held*, by the Court (Lord Coleridge, C.J., Denman, J., Pollock, B., Field and Stephen, JJ.), that such belief was immaterial, and that the conviction was right. The Queen *v.* Bishop - - - - C. C. R. 259

CRIMINAL LAW—*continued.*

7. —— *Procedure—Trade in Obscene Books—Death of Complainant—Abatement of Proceedings*—20 *&* 21 *Vict. c.* 83, *ss.* 1, 2, 3, 4.] Complaint having been duly made under 20 & 21 Vict. c. 83, that obscene books were kept by the defendant in his shop for sale, a warrant for the seizure of such books was issued, and after they had been seized the defendant was summoned to shew cause why they should not be destroyed. Upon the hearing of the summons an order was made for the destruction of the books. After the issuing of the summons, but before the hearing, the complainant died, and no application to substitute another complainant was made:—*Held*, that the proceedings against the defendant did not lapse upon the death of the complainant, and that the order was valid. The Queen *v.* Truelove - 336

8. —— *Practice—Misdemeanour — Perjury—Joinder of Distinct Offences in one Indictment—Deferred Sentence*—2 *Geo.* 2, *c.* 25, *s.* 2.] Upon an indictment for misdemeanour containing two counts for distinct offences the defendant may be sentenced to imprisonment or penal servitude for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence.—Under 2 Geo. 2, c. 25, s. 2, a defendant convicted of perjury upon an indictment containing two counts for distinct offences may be sentenced to consecutive terms of penal servitude.—Upon an indictment for perjury charging offences committed in different suits the defendant upon conviction may be sentenced to distinct punishments, although the suits were instituted with a common object.—C. was convicted upon an indictment for perjury containing two counts: in one count the offence was alleged to have been committed in an action in the Court of Common Pleas, in the other it was alleged to have been committed in a suit in the Court of Chancery, but the proceedings in both courts had one object. C. was sentenced to two consecutive terms of seven years' penal servitude:—*Held*, that the sentences might be lawfully passed. The Queen *v.* Castro - C. A. 490

DAMAGES, INSUFFICIENCY OF—*New Trial—Compensation for Pecuniary Loss from Personal Injury.*] A new trial will be granted, in an action for personal injuries sustained through the defendants' negligence, where the damages found by the jury are so small as to shew that they must have omitted to take into consideration some of the elements of damage.—Consideration of the directions proper to be given to a jury as to the damages to be awarded to the plaintiff for the bodily suffering arising from personal injuries, and the damages to be awarded to him for loss of professional income arising from those injuries. Phillips *v.* London and South Western Railway Company - - - - C. A. 78

DISCOVERY—Conclusiveness of affidavit - 556
See Practice. 16.

DISQUALIFICATION—Of member of local board —Lease of sewage farm - - 321
See Local Government Acts.

DISTRESS WARRANT—Poor rate—Summary jurisdiction - - - 300
See Poor Rate.

ELEMENTARY EDUCATION ACT, 1873 (36 & 37 *Vict.* c. 86), *s.* 10—*Elementary Education Act*, 1870 (33 & 34 *Vict.* c. 75), *ss.* 53, 54—*School Board—Borrowing Powers—Temporary Loan for current Expenses.*] A school board have not power, when the school fund proves insufficient, to contract a temporary loan for the purpose of meeting their current expenses until they can obtain money out of the rates.—Decision of the Queen's Bench Division (4 Q. B. D. 477) reversed. The Queen *v.* Sir Charles Reed - - - C. A. 483

ESTOPPEL—Forged transfer of stock - 188
See Company. 3.

—— Highway—Sewering and paving - 353
See Local Government Acts. 2.

EVIDENCE, ADMISSIBILITY OF — *Secondary Evidence of Contents of Written Documents received under a Commission to take Evidence Abroad without objection.*] Under a commission to take evidence abroad in an action, copies of certain documents and answers of witnesses with regard to the contents of such documents were received by the commissioners in evidence on behalf of the plaintiff, without objection on the part of the defendant who joined in the commission. The copy documents were appended to the depositions and returned by the commissioners:—*Held*, that the secondary evidence of the documents having been taken under the commission, without objection on the part of the defendant, was receivable before an arbitrator to whom the action was referred, and that it was too late then to take objection on the grounnd that the original documents were not produced. Robinson *v.* Davies - - 26

EXECUTOR—Tenant for life—Permissive waste
See Waste. [404

FOREIGN LAW—Marine policy effected in England - - - - - 272
See Insurance (Marine). 2.

FRAUD—Bankrupt—Removal of property in fraud of creditors—Infant - - 28
See Criminal Law; Debtors Act.

—— Goods obtained by—Pledge and repledge 284
See Pledge of Goods.

GENERAL AVERAGE—Duty of shipowner as to adjustment - - - - - 38
See Ship. 3.

GUARANTEE—Continuing—Notice of death of surety - - - - - 42
See Principal and Surety.

GUARDIAN—County of a town—Justices - 386
See Poor Law.

HIGHWAY—*Locomotive Act*, 1861 (24 & 25 *Vict.* c. 70)—*Locomotive Act*, 1865 (28 & 29 *Vict.* c. 83)—*Nuisance.*] The defendant was possessed of a traction engine, which was propelled by steam

HIGHWAY—*continued.*
power. Whilst it was being driven by the defendant's servants along a highway, some sparks escaping from it set fire to a stack of hay of the plaintiffs standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861, 1865, at the time of the accident it was being driven at a proper pace, and the defendant's servants were guilty of no negligence in the management of it:—*Held*, that the defendant was liable to compensate the plaintiffs for the injury done to the stack, upon the ground that, the engine being a dangerous machine, an action was maintainable at common law, and the Locomotive Acts did not restrict the liability of the defendant. Powell *v.* Fall - C. A. 597

2. —— *Turnpike — Bicycle — Liability to Toll.*] A Local Turnpike Act, 3 Wm. 4, c. lv., imposed the following tolls:—For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-à-vis, phæton, curricle, &c., 6*d.*—For every carriage of whatever description, and for whatever purpose, which shall be drawn or impelled, or set or kept in motion by steam or other power or agency, than being drawn by any horse or horses, or other beast or beasts of draught, 5*s.*:—*Held*, that a bicycle was not a carriage liable to toll under the Act. Williams *v.* Ellis - - - - - - 175

3. —— *Highway Act* (5 & 6 *Wm.* 4, *c.* 50), *s.* 76—"*Waggon, Cart, or other such Carriage*"—*Cart without Owner's Name on it—Light Spring Cart.*] An information was laid against the respondent for using a cart on the highway without having his name painted thereon, as required by 5 & 6 Wm. 4, c. 50, s. 76. The cart was a light spring cart with two wheels used by the respondent in his business as an agricultural implement maker, in which he frequently carried agricultural implements to market, and drove his family about from place to place, and for which he paid duty under 32 & 33 Vict. c. 14, s. 18. The magistrates dismissed the information:—*Held*, that the "cart or carriage" contemplated by the 76th section of 5 & 6 Wm. 4, c. 50, was "ejusdem generis" with a waggon, and that this was not such a cart, and that the magistrates were therefore right. Danby *v.* Hunter - - 20

HUSBAND AND WIFE—*Authority to pledge Credit during Cohabitation—Necessaries—Revocation of Implied Authority.*] A husband who is able and willing to supply his wife with necessaries, and who has forbidden her to pledge his credit, cannot be held liable for necessaries bought by her; and a tradesman, without notice of the husband's prohibition and without having had previous dealings with the wife with his assent, cannot maintain an action against him for the price of articles of female attire suitable to her station in life, and supplied to her upon his credit but without his knowledge or assent.—*Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177) approved of. Debenham *v.* Mellon C. A. 394

INCLOSURE—Mines and minerals - - 159
See Mine.

INDICTMENT—Joinder of distinct offences 490
See Criminal Law—Practice.

INFANT — Fraudulent bankruptcy — Debts not incurred for necessaries - - 28
See Criminal Law—Debtors Act.

INJUNCTION—Costs on higher scale - 167
See Practice. 6.

INSURANCE (FIRE)—*Contract of Indemnity—Payment by Insurer—Right of Insurer to Benefit of Contract entered into by Assured—Landlord and Tenant.*] A policy of fire-insurance is a contract of indemnity, and upon payment of the amount of loss the insurer is entitled to be put into the place of the assured; and if at a subsequent time the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him.—*North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (5 Ch. D. 569), commented upon and followed. Darrell *v.* Tibbitts' **C. A. 560**

INSURANCE (MARINE) — *General Average — Expenses of warehousing and reshipping Cargo, of Pilotage, and other Charges on Vessel leaving Port.*] Where a vessel goes into a port of refuge, in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average.—So *held*, affirming the judgment of the majority of the Queen's Bench Division. Atwood *v.* Sellar - **C. A. 286**

2. —— *Loss by Perils of the Sea—Payment in respect of Bottomry Bond—Foreign Law how far applicable to English Policy.*] A policy of marine insurance was effected with English underwriters by an English merchant upon goods shipped in a French ship, and it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision and put into port for repairs, the cargo, however, being uninjured. The master, not having funds to do the necessary repairs, gave a bottomry-bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods:—*Held*, that the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, and that there being no loss by perils of the sea according to English law, the assured could not recover from the underwriters the amount which he had paid as above mentioned. Greer *v.* Poole - **272**

3. —— *Policy and By-laws, Construction of —Constructive Total Loss—Insurance confined to "absolute Damage caused by the Perils insured against."*] A policy of marine insurance on ship effected with a mutual insurance company incorporated certain by-laws of the company endorsed thereon. The policy (inter alia) expressed it to be thereby declared that the acts of the assurer or assured in recovering, saving or preserving the property insured should not be considered a waiver or acceptance of abandonment. One of the by-laws provided that, in the event of any ship being

INSURANCE (MARINE)—*continued.*

stranded or damaged and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company should be deemed, or taken to be, an acceptance or recognition of any abandonment of which the assured might have given notice to such company, and the company under any circumstances should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured:—*Held*, by Lush, J., on further consideration, that the effect of the by-law was not to exclude a constructive total loss, but that it contemplated a partial loss only, and was intended to deprive the assured of the right he would otherwise have to claim extraordinary expenditure by way of salvage or otherwise in addition to the cost of repairs. Forwood *v.* North Wales Mutual Marine Insurance Company - - **57**

4. —— *Policy—Warranty against Average— "Stranding," what amounts to.*] A policy of marine insurance on cargo contained the usual warranty against average unless the ship were stranded. The place of discharge was in a tidal harbour, where vessels of the size of the ship in question can only get to the quay to unload during high spring tides. A ship arriving in the port is brought towards the quay as soon as in the pilot's judgment there will be water enough to float her there, and, if in the course of getting her to the quay the depth of water proves insufficient, she takes the ground to wait until the next tide admits of her being floated farther. The ship in question was in the course of being brought to the quay, but it was found that she could not get within twenty feet of it, and consequently she was left where she was to await a higher tide. As the tide receded and she settled down, instead of resting on an even keel she pitched by the head into a hole, and remained in such a position as to cause her timbers to be strained, by reason whereof she made water and damage resulted to the cargo. It afterwards appeared that there was an elevation in the bottom of the harbour, a small bank having been formed parallel with the quay, and a hole beside it into which the vessel had pitched. This state of things had been caused by the paddles of steamers leaving the harbour at low tide, and its existence had not been found out previously to the accident:—*Held*, that the taking of the ground by the vessel was under circumstances of such an accidental and unforeseen character as not to be in the ordinary course of navigation and to amount to a "stranding." Letchford *v.* Oldham [**C. A. 538**

INTEREST—Of member of local board—Sale of lease of lands - - - 321
See Local Government Acts.

JUSTICES — Preliminary inquiry — Evidence of truth of libel - - - 1
See Criminal Law—Justices.

KIDNAPPING ACT, 1872 (35 & 36 *Vict. c.* 19), *ss.* 3, 6, 9, 16, 20—*Seizure of Vessel by Naval Officer—Bonâ fide Belief—Reasonable Suspicion that Offence committed against the Statute.*] By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be a felony; by s. 16, any vessel suspected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the Act.—Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man-of-war, of which the defendant was commander; at the time of the seizure the defendant bonâ fide believed that there was reasonable ground for suspecting that an offence had been committed against the Act:—*Held*, no action would lie against the defendant. Burns *v.* Nowell [C. A. 444

LANDLORD AND TENANT—*Injury from bursting of Water Pipe—Premises let in Floors—Covenant for quiet Enjoyment.*] The defendant was owner of a house, which he let out in floors to separate tenants. The plaintiffs became tenants of the ground floor and basement under a lease, by which the defendant covenanted that the plaintiffs might "peaceably hold and enjoy the demised premises during the term without any interruption by the defendant." The different floors were supplied with water by a cistern at the top of the house, and the water was distributed by a main pipe connected with the cistern, each floor having a separate branch inserted in the main pipe. The defendant paid the water rate, receiving from the plaintiffs one half of the amount so paid, and the cistern was not demised to any one of the tenants. In consequence of the bursting of the branch service pipe supplying the first floor, a quantity of water flowed into the basement and injured the plaintiffs' goods. At the trial the jury found that the branch pipe was reasonably fit and proper for the purpose for which it had been fixed, and that the defendant had not been guilty of any negligence in keeping and maintaining it:—*Held*, affirming the judgment of Field, J., that under the circumstances there had been no breach of the defendant's covenant for quiet enjoyment, and that as the water had been stored in the cistern for the benefit of the plaintiffs as well as of the other tenants, the doctrine laid down in *Rylands* v. *Fletcher* (Law Rep. 3. H. L. 330) did not apply. Anderson *v.* Oppenheimer C. A. 602

—— Disclaimer of lease—Bankruptcy - 184
See Bankruptcy.

—— Insurance—Right of insurer to benefit of contract by assured - - 560
See Insurance (Fire).

LANDS CLAUSES CONSOLIDATION ACT, 1845—*Compensation—Matter not Legally the subject of Compensation—Application to quash Inquisition—Certiorari, Writ of—Discretion.*] Upon an application for a writ of certiorari to bring up and quash the proceedings upon an inquisition before the sheriff as to the amount of compensation to be awarded to a claimant under the Lands Clauses Consolidation Act, 1845, on the ground that the jury in assessing the compensation had taken into consideration matters which were not legally the subject of compensation:—*Held*, that the Court, having a discretion whether they would grant a writ of certiorari, would not do so where the applicants for the writ had allowed five months to expire without making any objection to the proceedings and had paid costs, and taken various other steps upon the footing that they were valid. —*Semble*, that as a general rule the writ of certiorari ought not to be granted in such a case after the expiration of the time allowed for setting aside an award made under the provisions of the above mentioned Act. The Queen *v.* Sheward [179

LIBEL—Defence of apology, payment into Court, and justification - 22; C. A. 302
See Practice. 15.

—— Evidence of truth of libel—Preliminary inquiry before justices - - 1
See Criminal Law—Justices.

LIQUIDATION BY ARRANGEMENT—Omission of creditor's name from statement of debts - - - - 470
See Bankruptcy. 2.

LOCAL GOVERNMENT ACTS—*Local Board—Disqualification for Membership—Lease of Sewage Farm by Local Board to Member—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *sched. II., clause* 64 —"*Interested in Sale or Lease of Lands.*"] A person is not disqualified for membership of a local board, under the 64th clause of the second schedule to the Public Health Act, 1875, by reason of a lease by the board to him of a sewage farm containing covenants on the part of the board to supply, and on his part to use on the premises, the sewage of the district. The Queen *v.* Gaskarth [321

2. —— *Estoppel—Res Judicata—Justices, Summary Proceedings before—Adjudication that Street is a Highway—Grounds of Appeal—Paving Expenses—Certificate of dismissal of Complaint*—11 & 12 *Vict. c.* 43, *s.* 14—38 & 39 *Vict. c.* 55, *s.* 150.] An application to justices by a local board under the Public Health Act, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. The local board some years after made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the said street, and the justices made an order for the payment of such expenses:—*Held*, that the adjudication of the justices, that the street was a highway repairable by the inhabitants at large, on the first application was conclusive of the question upon the second, and that the justices were therefore

LOCAL GOVERNMENT ACTS—*continued.*
bound to dismiss the second application.—*Held*, also, that the certificate of dismissal of a complaint provided for by 11 & 12 Vict. c. 43, s. 14, is merely intended for a convenient mode of proving the dismissal, and the adjudication was none the less conclusive because no such certificate had been given.—*Held*, also, that, on appeal to the sessions against the order of justices made on the second application, the previous adjudication could be proved and was conclusive evidence, under a ground of appeal alleging that the street in question was a highway repairable by the inhabitants at large. The Queen *v.* Hutchins 353

3. —— *Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 116, 117—*Unsound Meat, Destruction of —Notice to Owner not necessary.*] The 116th and 117th sections of the Public Health Act, 1875, give power to a medical officer of health or inspector of nuisances to seize meat, &c., exposed for sale or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man, which may appear to him to be diseased or unsound, and carry it before a justice, who, if it appears to him to be diseased or unsound, is to condemn the same and order it to be destroyed. The person to whom such meat, &c., belongs, is also rendered by section 117 liable to a penalty:—*Held*, that meat might be taken before a justice under the above sections, and condemned without any summons or notice to the person to whom it belonged, and that such person having been subsequently to the destruction of the meat summoned and convicted of an offence under the above sections, such conviction was good. White *v.* Redfern - - - - - 15

4. —— *Projection in Front of Building over Pavement — Absence of Obstruction to Traffic — 5 Vict. s.* 2, *c. xliv.*] A local Act for the promotion of health and the regulation of buildings in a borough enacted, after making various provisions for the prevention of nuisances upon the pavements of streets, that no projection should be made in front of any building over or upon the pavement:—*Held*, that this enactment did not apply to projections from the front of a building which were too high up to interfere with free passage along the footpath. Goldstraw *v.* Duckworth - - - - - - 275

LOCOMOTIVE ACT, 1861—Nuisance—Highway
See Highway. [597

LUNATIC—Removal of pauper lunatic—Order by officiating clergyman - - 95
See Practice. 3.

—— Reception in unlicensed house - 259
See Criminal Law—Lunatic.

MEAT, UNSOUND—Destruction of—Notice to owner - - - - 15
See Local Government Acts. 3.

METROPOLIS MANAGEMENT ACT, 1855 (18 & 19 *Vict.* c. 120), *ss.* 158, 159, 161—*Rate for defraying Expenses incurred in Execution of Act —Expenses not incurred for equal Benefit of Whole Parish—Form of Precept.*] By the Metropolis Management Act, 1855, s. 158, vestries and district boards are directed from time to time by order to require the overseers of the several parishes within their district to levy the sums which such vestries or district boards may require for defraying the expenses of the execution of the Act, and by s. 159, where it appears to any vestry or district board that all or any part of the expenses for defraying which any sum is by such vestry or board ordered to be levied, have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may by any such order direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require. By s. 161 the overseers are to make equal pound rates.—A precept to overseers under the above sections for the levy of a rate stated that the expenses, in respect of which it was needed, were not required for the equal benefit of the parish, and directed the rate to be levied as regarded such parts of the parish as consisted of land used as arable, meadow, or pasture land only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground in proportion of one-fourth part only of the net annual value of such land. The classes of land mentioned in the precept did not lie together, or form any division marked out by metes or bounds, but were scattered through the parish:—*Held*, that the precept was good.—Judgment of the Queen's Bench Division (4 Q. B. D. 389) affirmed. —*Howell* v. *London Dock Co.* (8 E. & B. 212; 27 L. J. (M.C.) 177) commented upon. The Queen *v.* London and Brighton Railway Company - - - - - C. A. 89

MINE—*Right to let down Surface without making Compensation — Custom — Inclosure Act.*] To a statement of claim for working mines under the plaintiff's land without leaving sufficient support for the surface, the defendant pleaded in his statement of defence that he was the lessee of the mines from the lord of the manor; that the plaintiff's land had, previously to the passing of an Inclosure Act under which the waste of the manor was inclosed and allotted, formed part of such waste: that the lord of the manor from time immemorial had been accustomed to work the mines under the waste without leaving sufficient support for the surface, and without making any compensation for injury so caused; that by the Inclosure Act it was provided that the lord of the manor, his successors or assigns, might hold all mines and quarries lying under the waste together with liberty of searching for, winning, and working the same as fully and freely as he or they might have had and enjoyed the same in case the Act had not been passed, and that without making or paying any satisfaction for so doing; and that it was further provided by the Act that compensation for damage caused to any person's allotment by such working of the mines should be assessed by a justice of the peace, and should, when so assessed, be paid by the occupiers of the other allotments in the same township:—*Held*, that the statement of defence was good, on the ground that, whether any valid custom such as alleged in the statement of defence existed previously to

MINE—*continued.*
the Act or not, the Act expressly gave to the lord of the manor and his assigns the right to let down the surface by mining without making any compensation.—*Beckett* v. *Bradley* (31 L. J. (Q.B.) 65) not followed. Gill *v.* Dickinson - 159

MISREPRESENTATION—Of authority - 390
See Company.

NECESSARIES—Husband and wife—Authority to pledge credit - - - 394
See Husband and Wife.

NEGLIGENCE—Damages for personal injuries 78
See Damages, Insufficiency of.

NUISANCE—Projection in front of building over footpath - - - - 275
See Local Government Acts. 4.

OBSCENE BOOKS—Criminal proceedings—Death of complainant - - - 336
See Criminal Law—Procedure.

PAYMENT INTO COURT—Action for libel 302
See Practice. 15.

PENALTY—Relief of debtor - 121; C. A. 592
See Bond.

PHARMACY ACT, 1868 (31 *&* 32 *Vict. c.* 121), *ss.* 1, 15—*Corporation acting as Chemist and Druggist—Liability to Penalties—"Person."*] In ss. 1, 15 of the Pharmacy Act, 1868—which prohibit under a penalty any person, not being a duly registered pharmaceutical chemist, from keeping open shop for the sale of poisons or using the name of chemist or druggist—the word "person" does not include a corporation, and the penalty cannot be recovered from an incorporated company for keeping a chemist's shop as described in the Act.—Judgment of the Queen's Bench Division (4 Q. B. D. 313) reversed. Pharmaceutical Society *v.* London Supply Association [C. A. 310

PLEADING—Embarrassing—Libel—Defence of apology, payment into Court and justification - - - 22; C. A. 302
See Practice. 15.

PLEDGE OF GOODS—*Pledgor and Pledgee—Goods obtained by Fraud from Pledgee and re-pledged.*] D. & Co. deposited certain goods with the plaintiffs as security for an advance; they afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment. D. & Co. obtained an advance from the defendants, and deposited the goods, with a power of sale, with them:—*Held*, affirming the judgment of the Queen's Bench Division, that as the plaintiffs had parted with their special property in the goods to D. & Co., they could not recover them in an action from the defendants who had obtained them bonâ fide and for a good consideration. Babcock v. Lawson - - - C. A. 284

POLICE, COUNTY—Arrest in borough with separate commission of peace - - 341
See Criminal Law—Justices, Jurisdiction of.

POOR LAW—*Divided Parishes Act* (39 & 40 *Vict. c.* 61), *s.* 34—24 *&* 25 *Vict. c.* 55, *s.* 3—"*Desertion" of Wife by Husband—Misconduct of Wife—Settlement by Residence.*] By 24 & 25 Vict. c. 55, s. 3, "where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident unless her husband return to cohabit with her."—A married woman having repeatedly committed adultery was ordered by her husband to leave his house. She left him accordingly and never returned to him, residing in a parish for such a term as would, if she had been a single woman, have made her irremoveable from and settled in it under the above section [as amended by 29 & 30 Vict. c. 113, s. 17], and 39 & 40 Vict. c. 41, s. 34:—*Held*, that the wife was settled in the parish where she resided apart from her husband, for although the conduct of the husband might have been under the circumstances justifiable, there had been such a desertion of her by him as to bring the case within 24 & 25 Vict. c. 55, s. 3. The Queen *v.* Maidstone Union 31

2. —— *Ex officio Guardians — County of a Town—"County, Riding, or Division"*—4 *&* 5 *Wm.* 4, *c.* 76, *ss.* 38, 109.] In 4 & 5 Wm. 4, c. 76, s. 38—which enacts that every justice of the peace residing in any union and acting for the "county, riding, or division" in which the same may be situated, shall be an ex officio guardian of such union—the word "county" includes county of a town, and justices acting for a county of a town, with a separate commission of the peace, and residing within the union, are entitled to vote and act as ex officio guardians equally with resident justices for the county at large. The Queen *v.* Pearce - - - - - 386

—— Order of removal—Officiating clergyman 95
See Practice. 3.

POOR RATE—*Distress Warrant—Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 6, 47.] The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), does not affect or apply to proceedings for the recovery of poor rates and other rates recoverable in the same manner as poor rates; and a distress warrant in respect of such rates may be issued as before the Act. The Queen *v.* Price 300

2. —— *Exemption from Rateability—"Society instituted for purposes of Science, Literature, or the Fine Arts exclusively"*—6 *&* 7 *Vict. c.* 36, *s.* 1.] A society, the primary object of which is the acquisition and advancement of scientific knowledge for the purposes and in the interests of a particular profession, such as that of civil engineers, is not a society instituted for purposes of science exclusively, within the 1st section of 6 & 7 Vict. c. 36, and consequently is not entitled to exemption from rating under that statute. The Queen *v.* Institution of Civil Engineers - - - 48

PRACTICE—*Appeal from Chambers to High Court—Party Appealing not appearing in High Court to support Notice of Motion—Hearing in Court of Appeal.*] If a party appealing from the decision of a judge at chambers does not appear in the High Court to support the motion, and judgment

PRACTICE—*continued.*

is thereupon pronounced against him in his absence, he cannot afterwards appeal to the Court of Appeal against the judgment of the High Court: the Court of Appeal has no jurisdiction to afford him relief. Walker *v.* Budden - C. A. 267

2. —— *Appeal — Criminal Matter — School Board—By-law—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 74—*Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66, *s.* 47.] The Court of Appeal has no jurisdiction to hear an appeal from a decision of the High Court of Justice upon a case stated by justices as to an information for contravening the by-laws of a school constituted under the Elementary Education Act, 1874: for the information relates to a criminal matter, within the meaning of the Supreme Court of Judicature Act, 1873, s. 47. Mellor *v.* Denham - - - 467

3. —— *Appeal from Inferior Court—No Leave to appeal from Order of High Court—Rule for Certiorari — Supreme Court of Judicature Act*, 1873, *ss.* 19, 45—*Poor Law—Removal of Pauper Lunatic to Asylum—Order by Officiating Clergyman*—6 & 7 *Vict. c.* 101, *s.* 56—*Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97), *s.* 67.] M., the wife of H., resided in the parish of G. Whilst H. was absent, M. was taken thence as a destitute person to the workhouse of C. Union, situate in the parish of C. After she had been an inmate for ten days, the medical officer of the union certified that she was of unsound mind, and thereupon a relieving officer of the union and the curate of the parish of C. ordered that she should be removed to an asylum. An order was afterwards made by two justices upon H. for the maintenance of M. Rules for certiorari were obtained by H. in the Queen's Bench Division for the purpose of removing the two orders into that court; but the rules were afterwards discharged. No leave to appeal was given by the Queen's Bench Division: —*Held*, that the Court of Appeal had jurisdiction to hear an appeal, notwithstanding the Supreme Court of Judicature Act, 1873, s. 45:—But, *held*, that the curate of the parish of C. was the officiating clergyman of the parish in which M. was residing within the meaning of 16 & 17 Vict. c. 97, s. 67; and that 7 & 8 Vict. c. 101, s. 56, did not apply. The Queen *v.* Pemberton. The Queen *v.* Smith - - - - C. A. 95

4. —— *Appeal—Interlocutory Order or Judgment—Case stated by Arbitrator for Opinion of High Court—Extension of Time for appealing—Rules of Supreme Court*, 1875, *Order LVIII., rules* 4, 15.] The decision of the High Court upon a special case stated for its opinion by an arbitrator, who is thereupon to make his award, is an "interlocutory order" within the meaning of Rules of the Supreme Court, Order LVIII., rule 15, and an appeal from the decision must be brought within twenty-one days.—An arbitrator, to whom an action had been referred, stated a special case as to a question of damages for the opinion of the Queen's Bench Division: judgment was given upon the 1st of April, for the defendants. A few days after the plaintiff's solicitor wrote both to the arbitrator and to the defendants' solicitor, stating that an appeal would be brought:

PRACTICE—*continued.*

on the 18th he had an attack of illness which incapacitated him from attending to business until the 25th: he was informed by counsel on the 26th that it was then too late to set down the appeal as from an interlocutory order; and accordingly on the 12th of May, he gave a fourteen days' notice of appeal as from a final order of judgment. At the hearing on the 23rd of February following, an objection was taken that the decision of the Queen's Bench Division was an interlocutory order or judgment, and that the appeal not having been brought within twenty-one days was too late: the objection having been allowed, the plaintiff then moved for an extension of time for appealing:—*Held*, that the application ought not to be granted.—*In re West Jewell Tin Mining Company, Little's Case* (8 Ch. D. 806) distinguished.—By Baggallay and Thesiger, L.JJ., that although before judgment applications for extension of time should be freely granted, yet after judgment applications of that kind ought to be allowed only with caution.—By Bramwell, L.J., that an application for extension of time ought to be granted at any stage of an action, whenever an unintentional mistake has been committed, and the damage to the opposite party may be repaired by payment of costs or otherwise. Collins *v.* Vestry of Paddington - - C. A. 368

5. —— *Costs—Action for more than* 50*l.—Counter-claim—Reference—Costs "to abide Event" —Judgment for Plaintiff on Balance for* 15*l.—Judicature Act*, 1873, *s.* 67—*County Courts Act*, 1867, *s.* 5.] An action was brought claiming first, 10*l.* for rent; secondly, 100*l.* as damages for breach of covenant in a lease of premises; and, thirdly, 30*l.* for conversion of the plaintiff's goods. The defendant pleaded, admitting that the rent was due, but denying the breach of covenant and conversion, and setting up a counter-claim for 100*l.* damages for breach of covenant by the plaintiff, and 15*l.* for money due for the use and occupation of other premises. The action was referred to an arbitrator by an order made by consent upon the terms that "the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator." The arbitrator found that the plaintiff was entitled to 10*l.* for rent; that the defendant had broken his covenant in the lease, and had been guilty of the conversion charged, and he awarded that the plaintiff was entitled to recover in respect of such breach of covenant and conversion the sum of 25*l.*, making together 35*l.* awarded to the plaintiff: that the plaintiff had broken his covenant, and that the defendant was entitled to recover in respect of that breach 20*l.*; and upon the whole matter he found that the plaintiff was entitled to recover in the action 15*l.* and no more:—*Held*, by the majority of the Court (Cockburn, C.J., and Manisty, J.), Field, J., dissenting, that the provision in the order of reference as to costs did not alter the rights of the parties, and that upon the true construction of s. 67 of the Judicature Act, 1873, the plaintiff was entitled to the costs on his claim, and the defendant to his costs on the counter-claim.—*Staples* v. *Young* (2 Ex. D. 324) questioned.—By Field, J., that the case was governed by the pro-

PRACTICE—*continued.*

vision as to costs in the order of reference, and that the plaintiff was entitled to the costs of the action, and that the defendant was not entitled to any.—*Chatfield* v. *Sedgwick* (4 C. P. D. 459) discussed. STOOKE *v.* TAYLOR - - - 569

6. —— *Costs on Higher Scale—Rules of Supreme Court (Costs), Order VI., rule* 2—*Injunction when principal Relief sought.*] In an action for trespass to land, the plaintiff claimed and obtained an injunction in addition to damages for the trespass. The nature of the trespass complained of did not involve any assertion of title or any injury of a permanent irreparable character. The plaintiff claimed costs on the higher scale under Rules of Supreme Court (Costs) Order VI., rule 2:—*Held*, affirming the judgment of the Queen's Bench Division, that this was not such an action for an injunction as to render the higher scale applicable within the rule. CHAPMAN *v.* MIDLAND RAILWAY COMPANY - Q. B. D. 167; C. A. 431

7. —— *Costs of Parties brought in by Notice under Order XVI., rule* 18—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Order XVI., rules* 18, 21.] There is no jurisdiction under the provisions of Order XVI., rule 21, to impose any terms with regard to the payment of the costs of a party brought in by notice under rule 18 upon the party bringing him in:—*Quære*, whether the provisions of Order XVI. extend to bringing in any parties beyond the third party. YORKSHIRE WAGGON COMPANY *v.* NEWPORT COAL COMPANY - - - 268

8. —— *Security for Costs—Foreigner residing without Jurisdiction—Defendant, how far liable to give Security—Counter-claim arising out of same Matters as Plaintiff's Claim.*] In an action for breach of contract against the defendant, a foreigner residing abroad, he, by his defence, denied the breaches, and also made a counter-claim for breaches of the same contract by the plaintiff, claiming damages to an amount less than the plaintiff's claim:—*Held*, that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter-claim. MAPLESON *v.* MASINI - - - - 144

9. —— *Taxation of Costs of Appeal before termination of Action.*] An application by a defendant in an action in the Queen's Bench Division, to strike out the statement of claim as embarrassing, having been refused by a Divisional Court, the defendant appealed, and the Court of Appeal made an order "that the judgment of the Court below be reversed with costs of this appeal and of the proceedings in the Court below." The defendant applied to the master to tax the costs, which he declined to do on the ground that they were costs of an interlocutory application, and that the taxation must stand over till the termination of the action:—*Held*, by the Court of Appeal, that the practice of the Common Law Divisions to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal, and that under an order of the Court of Appeal directing payment of costs, without any intimation that the taxation and payment are to be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith. PHILIPPS *v.* PHILIPPS - C. A. 60

PRACTICE—*continued.*

10. —— *Costs—Taxation—Separate Proceeding between same Parties—Rules of Supreme Court (Costs), Order VI., rule* 19.] Under Order VI., rule 19 of the Rules of the Supreme Court (Costs)—by which, whenever, in cases specified, a party entitled to receive costs is liable to pay costs to the other party, the taxing officer may adjust the costs by way of deduction or set-off—such set-off is limited to costs due to either party in respect of the same action, and cannot be enforced in respect of the costs of any separate proceeding between the same parties.—The plaintiffs having recovered judgment against two defendants the judgment was set aside as against one defendant with costs. The same defendant having claimed goods taken in execution by the plaintiffs under the same judgment the sheriff interpleaded, and an order was made barring the claim with costs to be paid to the plaintiffs:—*Held*, that the master, in taxing the costs of such defendant could not order the costs payable by him under the interpleader proceedings to be set-off against the costs due to him in the action from the plaintiffs. *Barker* v. *Hemming* - - - - - 609

11. —— *County Court, Appeal from*—38 & 39 *Vict. c.* 50, *s.* 6—*Omission to request Judge to take Note—Note actually taken and furnished—Right to Appeal—Bankruptcy—Composition—Invalid Resolution—Sale of Debt—Bill of Sale—Assignment by Debtor to Surety.*] At the hearing of an interpleader claim in a county court, the judge was not asked to make a note of any question of law raised or of the facts in evidence as provided by 38 & 39 Vict. c. 50, s. 6. He did, however, take a note of the evidence, and upon being applied to afterwards by the claimant, against whom he decided, furnished him, but under protest, with a copy of the note and his written judgment, in each of which was a statement of the points of law raised and determined:—*Held*, that the omission to request the judge to take a note did not deprive the claimant of the right to appeal by motion under s. 6.—P. having filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, his creditors, except G., resolved to accept a composition of 5s. in the pound, payable by instalments. W. became surety for the composition, and P. assigned his property to W. by a duly registered bill of sale. W. bought the debt due to G., and was thereby enabled to vote in his name at the second meeting of creditors. The resolutions for composition had not been set aside. The plaintiff having obtained judgment against P., seized a stack of hay comprised in the bill of sale:—*Held*, that the resolutions not having been set aside, the bill of sale could not be impeached, and the plaintiff could not enforce his execution against the property assigned to W. SEYMOUR *v.* COULSON C. A. 359

12. —— *County Court—Appeal by Motion—Judge in Chambers—Adjournment to Divisional Court*—38 & 39 *Vict. c.* 50, *s.* 6.] Under 38 & 39 Vict. c. 50, s. 6,—which gives an appeal by motion from the decision of a county court, and enacts that where the Court to which such appeal lies is not then sitting, the motion may be made before a judge in chambers—the judge in chambers before whom such a motion is made cannot adjourn the

PRACTICE—*continued.*

further hearing of it to the next sitting of the Court to which the appeal lies, but must himself hear and determine it. Button *v.* Woolwich Building Society - - - - 88

13. —— *Order LIV., rule* 6—*Appeal from Chambers.*] An order having been made in chambers on the 20th of June, the defendant, on the 24th, gave notice of appeal to a Divisional Court for Saturday, the 28th. The Court sat on the 26th to hear motions, and was sitting on the 28th, but not for the purpose of hearing motions. The defendant brought forward his motion on the 30th, being the next day on which the Court sat to hear motions:—*Held*, affirming the decision of the Queen's Bench Division, that the appeal motion was out of time, since a Court to which an application to enlarge the time could be made had been sitting within the eight days. Stirling *v.* Du Barry - - - - C. A. 65

14. —— *Motion to set aside Special Finding of Jury—Entry of Judgment by High Court—Rules of the Supreme Court, Order XL., rules* 4, 10.] When judgment has been given in an action tried before a jury who have found specially the facts in dispute, upon a motion in the High Court to set aside the findings the Court has power to set aside the judgment and enter it for the unsuccessful party at the trial, if they are of opinion that the findings and the judgment at the trial cannot stand, and if they have before them all the materials necessary for finally determining the questions in dispute. Hamilton *v.* Johnson [C. A. 263

15. —— *Pleading—Payment into Court—Several Defences—Embarrassing Defence—Rules of Supreme Court, Order XXX., rule* 1; *Order XXVII., rule* 1—6 *& 7 Vict. c.* 96, *s.* 2.] The defendant, in an action for libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of the innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper, under 6 & 7 Vict. c. 96, and also a payment of 40*s.* into court.—*Held*, overruling the judgment of the Queen's Bench Division, that the offering of an apology, and payment into court, and of a justification, could be pleaded together. Hawkesley *v.* Bradshaw - - Q. B. D. 22; C. A. 302

16. —— *Production of Documents—Affidavit of Documents—Application for further Affidavit—Rules of the Supreme Court*, 1875, *Order XXXI., rule* 12.] An affidavit of documents made pursuant to Rules of the Supreme Court, 1875, Order XXXI., rule 12, is conclusive against the party seeking discovery, unless it can be shewn either from the affidavit itself, or from the documents therein referred to, or from an admission in the pleading of the party swearing the affidavit, that other documents exist in his possession or power which are material and relevant to the action. In any of these instances, but not otherwise, a further affidavit may be ordered. Jones *v.* Monte Video Gas Company - - - C. A. 556

17. —— *Referee—Judicature Act*, 1873, *s.* 57—*Prolonged examination of Accounts—Reference of all Issues in the Action to Official Referee—Order*

PRACTICE—*continued.*

XXXVI., rule 5.] Any question of account which may be referred compulsorily to a master under s. 3 of the Common Law Procedure Act, 1854, may also be referred compulsorily to an official referee under s. 57 of the Judicature Act, 1873.—In any case in which the Court has jurisdiction to refer compulsorily a question of account to an official referee, it has also jurisdiction so to refer all the other issues in the action. Ward *v.* Pilley [C. A. 427

PRINCIPAL AND AGENT—*Undisclosed Principal—Consignor and Consignee—Sub-contract—Right to follow Money—Trustee.*] The plaintiffs were landowners in New Zealand having offices in Glasgow, but no office or agency in London. They were in the habit of shipping corn from New Zealand, taking bills of lading which made it deliverable to them in London, and indorsing these bills of lading to M. & T., merchants and factors of Glasgow, with instructions to sell the goods in London. M. & T., when any sales had been effected, delivered account sales in the usual form, deducting a del credere commission of 3 per cent. M. & T. having no house or agency in London were themselves in the habit of indorsing to the defendants, who were corn factors and brokers in London, the bills of lading so received by them from the plaintiffs for the purpose of delivering the same in London, the terms upon which the defendants were employed varying from those under which M. & T. acted as regards rate of commission and time of payment. The indorsement of the bills of lading by the plaintiffs to M. & T., and by M. & T. to the defendants, was in each case only for the purpose of selling the corn, and without the intention of passing any property in it. The plaintiffs knew that the sales effected for them by M. & T. in London were made by brokers employed by M. & T., but the plaintiffs were in no way parties to the particular contracts of sale, nor were their names disclosed upon them. The defendants effected sales of certain parcels of the corn in question, and paid the proceeds into their own account with their bankers, and from time to time made several remittances to M. & T. on account of them; but upon reference to the defendants' books of account, the proceeds of the sale of the particular parcels of corn could be separated and identified.—The plaintiffs having brought an action against the defendants for the net balance due from them in respect of the corn, after deducting the remittances made to M. & T.; the jury found at the trial, first, that the plaintiffs did not through their agents employ the defendants to sell and account for the proceeds of the corn, secondly, that the defendants knew or had reason to believe that M. & T. were acting in the sales as agents for a third person:—*Held*, by Field, J., that notwithstanding the first finding, the plaintiffs were upon the admitted facts entitled to recover the balance claimed from the defendants, without any set-off in respect of other transactions between the defendants and M. & T., and that their right to recover was both as undisclosed principals, and also as being owners of the corn, and as such entitled to follow the proceeds of their property in the hands of the defendants

PRINCIPAL AND AGENT—*continued.*
in their fiduciary character of agents and trustees. New Zealand Land Company *v.* Ruston [474

2. —— *Undisclosed Principal, Sale of Goods to Agent of—Payment by Principal to Agent, under what Circumstances an Answer to an Action brought by the Seller for the Price.*] The defendants employed C., a broker, to buy oil for them. C. accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who those principals were. The terms of the sale were "cash on or before delivery;" but, though it is not infrequent in the oil trade in such a case to require payment before delivery, there is no invariable custom to that effect. The plaintiffs delivered the oil to C. without insisting on prepayment, and the defendants, not knowing that the plaintiffs had not been paid, paid C. Shortly afterwards C. stopped payment, and the plaintiffs thereupon sued the defendants for the price:—*Held*, affirming the decision of Bowen, J., that, as the plaintiffs at the time of the sale knew the broker was buying for principals, and not on his own account, the fact of the defendants having paid the broker did not preclude the plaintiffs from suing them for the price, unless before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker; and that the mere omission on the part of the plaintiffs to insist on prepayment was not, in the absence of an invariable custom to that effect, such conduct as would reasonably induce such belief.—*Heald* v. *Kenworthy* (10 Ex. 739; 24 L. J. (Ex.) 76) followed.—*Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 598) discussed. Irvine *v.* Watson **Q. B. D. 102; C. A. 414**

PRINCIPAL AND SURETY—*Guarantee, continuing—Notice of Death of Guarantor—Revocation*—A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor. Coulthart *v.* Clementson - - - **42**

—— Release—Omission to value collateral security under bankruptcy - - **422**
See Bankruptcy. 3.

PRISON—*Prisons Act*, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4, 57—*Prisoner—Expenses of Conveying to Prison.*] An order was made under 27 Geo. 3, c. 3, by a metropolitan police magistrate upon a county treasurer for the payment to a police constable of the expenses of the conveyance from the police court to prison of a person sentenced to imprisonment on summary convictions. A similar order was made in respect of the expenses of the conveyance from the police court to prison of a person committed for trial for felony. The county treasurer refused to comply with the orders, on the ground that the liability to these expenses had been transferred by the Prisons Act, 1877, from the county treasurer to the Secretary of State:—*Held*, that the provisions of the Prisons Act, 1877, included only the expenses of prisoners subsequent to their reception in the prison, and consequently that they did not affect the liability of the county treasurer to pay the expenses ordered to be paid as

PRISON—*continued.*
above mentioned. Mullins *v.* The Treasurer of the County of Surrey - - - **170**
—— Admission to reformatory—Expenses of clothing - - - - - **332**
See Reformatory.

PROMOTER—Company—Secret profit - **109**
See Company. 4.

RAILWAY—*Carrier—Goods destroyed by Fire—When a Carrier ceases to be liable as such and becomes a Warehouseman.*] A package of goods was delivered to the Great Western Railway Company and another to the London and North Western Railway Company for carriage to the station of the former company at W., both packages being addressed to the plaintiff "to be left till called for." One of the packages arrived at W. on the 24th of March, the other on the 25th. On their arrival they were placed in the station warehouse to await their being called for. The defendants did not know the address of the plaintiff, who travelled about the country with drapery goods. The goods had not been called for when, on the morning of the 27th of March, a fire having accidentally broken out, the warehouse was burned down and the goods were consumed by fire. The plaintiff on the same day after the fire called for the goods, and not receiving them, brought actions against the defendant companies as common carriers to recover their value:—*Held*, that, after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and consequently that the actions were not maintainable in the absence of any evidence of negligence on the part of the defendants. Chapman *v.* Great Western Railway Company - - **278**

2. —— *Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48)—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2, 3—"*Facilities*" *for receiving, forwarding, and delivering of Traffic—Order for Railway Company to erect or alter Stations and other structural Works—Railway Commissioners—Jurisdiction.*] The Railway Commissioners appointed under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), are not entitled in the execution of the provisions of the Railway and Canal Traffic Act. 1854 (17 & 18 Vict. c. 31), ss. 1, 2, 3, to make orders directing railway companies, for the better accommodation of the public, to erect or enlarge stations and other structural works. So *held*, by Cockburn, C.J., and Manisty, J. (Lush, J., dissenting).—Application having been made to the Railway Commissioners for an order requiring a railway company to enlarge their station at the town of H., and to provide better booking office, waiting room, refreshment room, and general accommodation therein; to lengthen and deepen the existing platforms of the station, and to provide additional platforms; to provide better warehouse accommodation for goods at the station; to provide better pens at the same station, and additional sidings for cattle trucks; to enlarge the platform of the station at the town of S. L., and to provide that station with a new approach by a direct

RAILWAY—*continued.*
route—the Commissioners made or proposed to make orders to the effect that a substantial addition should be made to the area of the covered platform at H.; that the yard should be so arranged as that carriages might set down and take up under cover; and that the company should provide at H. two general and first-class waiting rooms, each at least twice as large as the largest of the then present rooms, and should reserve also part of their buildings for refreshment purposes: —*Held*, by the majority of the Court (Cockburn, C.J., and Manisty, J., Lush, J., dissenting), that upon the true construction of the words of 17 & 18 Vict. c. 31, s. 2, requiring railway companies "to afford all reasonable facilities for the receiving, and forwarding, and delivery of traffic upon and from the several railways worked by such companies respectively;" such facilities could not include structural accommodation, and that the Railway Commissioners had no jurisdiction to entertain an application for an order for the structural erections and alterations in question; that their orders were invalid, and a prohibition must be granted.—By Lush, J., dissenting, that the word "facilities" must be taken in the case of railways to include suitable stations and platforms, and that the Commissioners had jurisdiction to entertain the application and to make the orders, except the order to provide a refreshment room, that is, a room in which the company were to provide refreshments. South Eastern Railway Company *v* Railway Commissioners 217

RAILWAY COMPANY—By-law—Ultrà vires
See By-law. [456

REFERENCE — Prolonged examination of accounts - - - - 427
See Practice. 17.

REFORMATORY SCHOOL—*Admission of Prisoner —Expense of providing requisite Clothing—Prison Act*, 1865 (28 & 29 *Vict. c.* 126), *s.* 5—*Reformatory Schools Act*, 1866 (29 & 30 *Vict. c.* 117), *ss.* 14, 23 —*Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4, 57.] By the Prison Act, 1877, the "prison authority," constituted under the Prison Act, 1865, s. 5, is relieved from the obligation of defraying the expense of clothing requisite for the admission of a youthful offender to a reformatory school under the Reformatory Schools Act, 1866, ss. 14, 23; for expenses of that description fall within the definition of "maintenance of a prisoner" contained in the Prison Act, 1877, s. 57, and must be defrayed out of moneys provided by Parliament under s. 4.—Judgment of the Queen's Bench Division (4 Q. B. D. 329) affirmed. Prison Commissioners *v.* Corporation of Liverpool [C. A. 332

RULES—Order VI., r. 2 - - 167, 431
See Practice. 6.

—— Order XVI. rr. 18, 21 - - - 268
See Practice. 7.

—— Order XXVII., r. 1 - - - 302
See Practice. 15.

—— Order XXX., r. 1 - - - 302
See Practice. 15.

—— Order XXXI., r. 12 - - - 556
See Practice. 16.

RULES—*continued.*
—— Order XXXVI., r. 5 - - - 427
See Practice. 17.

—— Order XL., rr. 4, 10 - - - 263
See Practice. 14.

—— Order LIV., r. 6 - - - 65
See Practice. 13.

—— Order LVIII., rr. 4, 15 - - - 368
See Practice. 4.

SALE OF GOODS—*Bill of Lading—Title of First Indorsee — Production of Unindorsed Copy — Warehouseman, liability of.*] Goods having been shipped for London consigned to C. & Co., the shipmaster signed a set of three bills of lading, marked "First," "Second," and "Third," respectively, making the goods deliverable "to C. & Co., or their assigns, freight, payable in London, the one of the bills being accomplished, the remainder to stand void." During the voyage, C. & Co. indorsed the bill of lading marked "First" to the plaintiffs for valuable consideration. Upon the arrival of the ship at London, C. & Co., entered the goods as consigned to them, and they were landed and placed in the custody of the defendants in their warehouses; the master lodging with the defendants notice under the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to and lodged with the defendants the second part of the set of bills of lading. The defendants accordingly entered C. & Co, in their books as enterers, importers, and proprietors of the goods, and the stop for freight being afterwards removed, they delivered the goods to various persons upon delivery orders signed by C. & Co.:— *Held*, by Field, J., that the defendants were liable in an action by the plaintiffs for the value of the goods, for without deciding whether the master could have been exonerated by a delivery of the goods to the person first presenting a bill of lading, the defendants were not by receiving the goods, subject to the stop for frieght, placed in the same position as the master and entitled to his rights; and further, that in delivering the goods upon the order of C. & Co., they had acted in a character beyond that of mere warehousemen, and were guilty of a conversion. Glyn, Mills, Currie, & Co. *v.* East and West India Dock Company 129

—— Revocation of offer - - - 346
See Contract.

SCHOOL BOARD—Borrowing powers - 483
See Elementary Education.

SECURITY FOR COSTS—Foreigner residing without jurisdiction - - - 144
See Practice. 8.

SESSIONS—Appeal from order in bastardy—Decision on merits - - - 382
See Bastardy.

SETTLEMENT—Poor law—Desertion of wife by husband - - - - 31
See Poor Law.

SEWERING AND PAVING—Local Government Acts—Arbitration - - - 321
See Local Government Acts.

SHIP—*Charterparty—Freight payable "on intake Measure of Quantity delivered"—Measurement at Port of Shipment—Loss of Part of Cargo.*] A cargo of deals and battens consigned to the defendants, was shipped on board the plaintiffs' vessel under a charterparty by which freight was to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1980 superficial feet, and on deal ends at the rate of 2*l.* 1*s.* 1*d.*, per the like hundred eight feet and under. "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." A bill of lading was signed for a specified number of pieces, deals, battens, and scantling, making freight payable "as per charterparty." The various pieces were, in the ordinary course of business, measured by the shipper at the port of shipment and their dimensions entered in a specification; the figures representing such dimensions being, before shipment, chalked on each piece respectively. During the voyage a number of the pieces were lost. The remainder was delivered at the port of destination, but the measurement figures put on some of the pieces delivered had become obliterated. The dimensions of the pieces lost were unknown; but there was some evidence that they were of average size compared with the rest of the cargo:—*Held*, by Bowen, J., that under the charterparty freight was payable on the measurement figures as ascertained at the port of shipment, and not on the quantity delivered measured at the port of discharge, according to the intake mode of measurement; and that, having regard to the particular circumstances, the amount might be calculated by assuming that the pieces lost were of average size as compared with the remainder, and making a proportionate reduction from the sum total of the measurements in the specification. Spaight *v.* Farnworth - 115

2. —— *Charterparty—Place of Discharge—"So near thereto as she may safely get."*] By the terms of a charterparty the ship was to take in a full cargo at Bombay, and proceed therewith to a safe port on the continent between Havre and Hamburg as ordered, "or so near thereto as she might safely get." The cargo was to be brought to and taken from alongside at merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder in Holland. Koogerpolder is some distance up a canal, and the vessel with her full cargo on board drew too much water to proceed up the canal. No arrangements had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The portion of the cargo that required to be unloaded in order to enable the vessel to enter the canal was at least a third. The question arising under these circumstances between the shipowners and the charterers which of them ought to bear the expenses of lightering the cargo from the mouth of the canal to Koogerpolder:—*Held*, that under the circumstances, the voyage under the charterparty ended at the mouth of the canal, and that consequently the charterers ought to bear the above-mentioned expenses.—Meaning of the words "as near thereto as she may safely get" discussed. Capper *v.* Wallace 163

3. —— *General Average—Security for Payment—Shipowner, Duty of—Bill of Lading—*

SHIP—*continued.*

General Exemption from Liability.] A shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment.—The plaintiffs shipped goods at Liverpool on board a steamer belonging to the defendants under a bill of lading, by which the defendants undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded (upon the conditions before and after expressed) thence per railway to the station nearest to Toronto, &c., and among the conditions was the following: "The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, &c."—In the course of the voyage the plaintiffs' goods sustained damage which came under the heading of general average. The ship returned to Liverpool, and the cargo was discharged and handed over by the defendants to a company to be distributed and disposed of for the benefit of the parties concerned, without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged to get an average statement made out, or taking any steps to enable the plaintiffs to recover contribution:—*Held*, first, that the bill of lading did not relieve the defendants from contribution to general average, and, secondly, that they were liable to an action by the plaintiffs for their omission to take the necessary steps to secure an adjustment and payment of the general average. Crooks *v.* Allan - - - - - - 38

4. —— *Appeal—Suspension of Certificate by Court of Inquiry into Shipping Casualty—Ship—Jurisdiction—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 242, 432—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 23—*Shipping Casualties Investigations Act*, 1879 (42 & 43 *Vict. c.* 72), *s.* 2—*Costs of Appeal.*] Where a court of inquiry into a shipping casualty, held under the eighth part of the Merchant Shipping Act, 1854, orders the suspension of a master's certificate, in pursuance of the powers given by the 242nd section of the same Act, and the 23rd section of the Merchant Shipping Act, 1862, the Court of Appeal, having jurisdiction under the Shipping Casualties Investigations Act, 1879, will on appeal consider the evidence on which the judgment of the court of inquiry proceeded, and will reverse the judgment if the evidence is insufficient to justify the suspension of the certificate.—Where a court of inquiry ordered a master's certificate to be suspended, and the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master, within the meaning of s. 242 of the Merchant Shipping Act, 1854, sub-s. 2, and on appeal it appeared to the Court of Appeal, that there was no evidence that the damage had been caused by the wrongful act or default of the master, the Court of Appeal reversed the decision, and restored to the master his certificate.—The Court below having suspended the certificate on the invitation of the Board of Trade, the Court of Appeal ordered the Board of Trade to pay the costs of the appeal. The Arizona - - 123

SHIP—*continued.*
—— General average—Expenses of warehousing and reshipping - - - 286
See Insurance (Marine).
—— Marine policy—Foreign law - - 272
See Insurance (Marine). 2.

SOCIETY—For purposes of science—Rateability
See Poor Rate. 2. [48

STATUTES:
2 Geo. 2, c. 25, s. 2 - - - 490
See Criminal Law—Practice.
4 & 5 Wm. 4, c. 76, ss. 38, 109 - - 386
See Poor Law. 2.
5 & 6 Wm. 4, c. 50, s. 76 - - - 20
See Highway. 3.
5 & 6 Wm. 4, c. 76, ss. 76, 101 - - 341
See Criminal Law—Justices, Jurisdiction of.
6 & 7 Vict. c. 36, s. 1 - - - 48
See Poor Rate. 2.
6 & 7 Vict. c. 96, s. 2 - - - 302
See Practice. 15.
—— —— ss. 4, 5, 6 - - - 1
See Criminal Law—Justices.
6 & 7 Vict. c. 101, s. 56 - - - 95
See Practice. 3.
7 & 8 Vict. c. 101, s. 56 - - - 95
See Practice. 3.
8 Vict. c. 20, ss. 108, 109 - - - 456
See By-law.
8 & 9 Vict. c. 100, s. 44 - - - 259
See Criminal Law—Lunatic.
11 & 12 Vict. c. 43, s. 3 - - - 343
See Criminal Law—Justices, Jurisdiction of.
—— —— s. 14 - - - - 353
See Local Government Acts. 2.
16 & 17 Vict. c. 97, s. 67 - - - 95
See Practice. 3.
17 & 18 Vict. c. 31, ss. 1, 2, 3 - - 217
See Railway. 2.
17 & 18 Vict. c. 104, ss. 242, 432 - - 123
See Ship. 4.
18 & 19 Vict. c. 120, ss. 158, 159, 161 - 89
See Metropolis Management Act.
18 & 19 Vict. c. 128, s. 18 - - - 67
See Burial Acts.
19 & 20 Vict. c. 69, s. 6 - - - 341
See Criminal Law—Justices, Jurisdiction of.
20 & 21 Vict. c. 83, ss. 1, 2, 3, 4 - - 336
See Criminal Law—Procedure.
24 & 25 Vict. c. 55, s. 3 - - - 31
See Poor Law.
24 & 25 Vict. c. 70 - - - - 597
See Highway.
24 & 25 Vict. c. 100, s. 58 - - - 307
See Criminal Law—Abortion.
25 & 26 Vict. c. 63, s. 23 - - - 123
See Ship. 4.
25 & 26 Vict. c. 89, ss. 95, 131 - - 149
See Company. 5.

STATUTES—*continued.*
26 & 27 Vict. c. 65, s. 21, sub-ss. 1, 2 - 548
See Volunteer Act.
28 & 29 Vict. c. 126, s. 5 - - - 332
See Reformatory.
29 & 30 Vict. c. 117, ss. 14, 23 - - 332
See Reformatory.
29 & 30 Vict. c. 122, s. 6 - - - 155
See By-law.
31 & 32 Vict. c. 121, ss. 1, 15 - - 310
See Pharmacy Act, 1868.
32 & 33 Vict. c. 62, s. 12 - - - 28
See Criminal Law—Debtors Act.
32 & 33 Vict. c. 70, ss. 65, 66, 67, 68, 69 325
See Contagious Diseases (Animals) Act.
32 & 33 Vict. c. 71, ss. 23, 24 - - 184
See Bankruptcy.
33 & 34 Vict. c. 75, ss. 53, 54 - - 483
See Elementary Education.
—— —— s. 74 - - - - 467
See Practice. 2.
35 & 36 Vict. c. 19, ss. 3, 6, 9, 16, 20 - 444
See Kidnapping Act, 1872.
35 & 36 Vict. c. 65, s. 4 - - - 126
See Bastardy. 2.
36 & 37 Vict. c. 48 - - - - 217
See Railway. 2.
36 & 37 Vict. c. 66, ss. 19, 45 - - 95
See Practice. 3.
—— —— s. 24, sub-s. 3 - - - 268
See Practice. 7.
—— —— s. 47 - - - - 467
See Practice. 2.
—— —— s. 57 - - - - 427
See Practice. 17.
—— —— s. 67 - - - - 569
See Practice. 5.
36 & 37 Vict. c. 86, s. 10 - - - 483
See Elementary Education.
37 & 38 Vict. c. 62, s. 1 - - - 28
See Criminal Law—Debtors Act.
38 & 39 Vict. c. 50, s. 6 - - 88, 359
See Practice. 11.
38 & 39 Vict. c. 55, sched. 2, clause 64 - 321
See Local Government Acts.
—— —— ss. 116, 117 - - - 15
See Local Government Acts. 3.
—— —— s. 150 - - - - 353
See Local Government Acts. 2.
38 & 39 Vict. c. 63, ss. 13, 20 - - 552
See Adulteration.
39 & 40 Vict. c. 61, s. 34 - - - 31
See Poor Law.
40 & 41 Vict. c. 21, ss. 4, 57 - - 170
See Prison.
—— —— ss. 4, 57 - - - - 332
See Reformatory.
42 & 43 Vict. c. 49, ss. 6, 47 - - 300
See Poor Rate.
42 & 43 Vict. c. 72, s. 2 - - - 123
See Ship. 4.

STATEMENT OF DEBTS—Liquidation—Omission of creditor's name - - 470
See Bankruptcy. 2.

STRANDING—What amounts to - - 538
See Insurance (Marine). 4.

TRUST—Constructive—Director and shareholder
See Company. 2. [518

—— Right to follow money—Principal and agent
See Principal and Agent. 2. [474

VOLUNTEER ACT, 1863 (26 & 27 *Vict. c.* 65), *s.* 21, *sub-ss.* 1, 2—*Dismissal of Member—Administrative Battalion—Commanding Officer.*] Under the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21, sub-ss. 1, 2, the ordinary commanding officer of a volunteer corps, which forms part of an administrative battalion, is authorized to dismiss a member from the corps for breach of discipline, although the corps is at the time assembled in camp with the rest of the administrative battalion under the general command of the battalion commander. Tombs *v.* Magrath - - 548

WARRANT, BACKING OF—Arrest by county police in borough with separate commission of peace - - - 341
See Justices, Jurisdiction of.

WASTE, PERMISSIVE—*Tenant for Life—Devise for Life of Premises subject to Obligation to Repair—Action for Non-repair by Remainderman in Fee against Executor of Tenant for Life*—3 & 4 *Wm.* 4, *c.* 42, *s.* 2.] A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Wm. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property:—*Held*, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death. Woodhouse *v.* Walker - - - 404

WATER-PIPE—Bursting of—Covenant for quiet enjoyment - - - - 602
See Landlord and Tenant.

WORDS—"County, riding, or division" - 386
See Poor Law. 2.

—— "Desertion" - - - - 81
See Poor Law.

—— "Facilities" - - - - 217
See Railway. 2.

—— "On intake measure of quantity delivered"
See Ship. [115

—— "Person" - - - - 310
See Pharmacy Act.

—— "Stranding" - - - - 538
See Insurance (Marine). 4.

—— "So near thereto as she may safely get" 163
See Ship. 2.

—— "To abide event" - - - 569
See Practice. 5.

—— "Waggon, cart, or other such carriage" 20
See Highway. 3.

END OF VOL. V.

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